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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 589

WILLIAM JACOB, PETITIONER,

vs.

THE CITY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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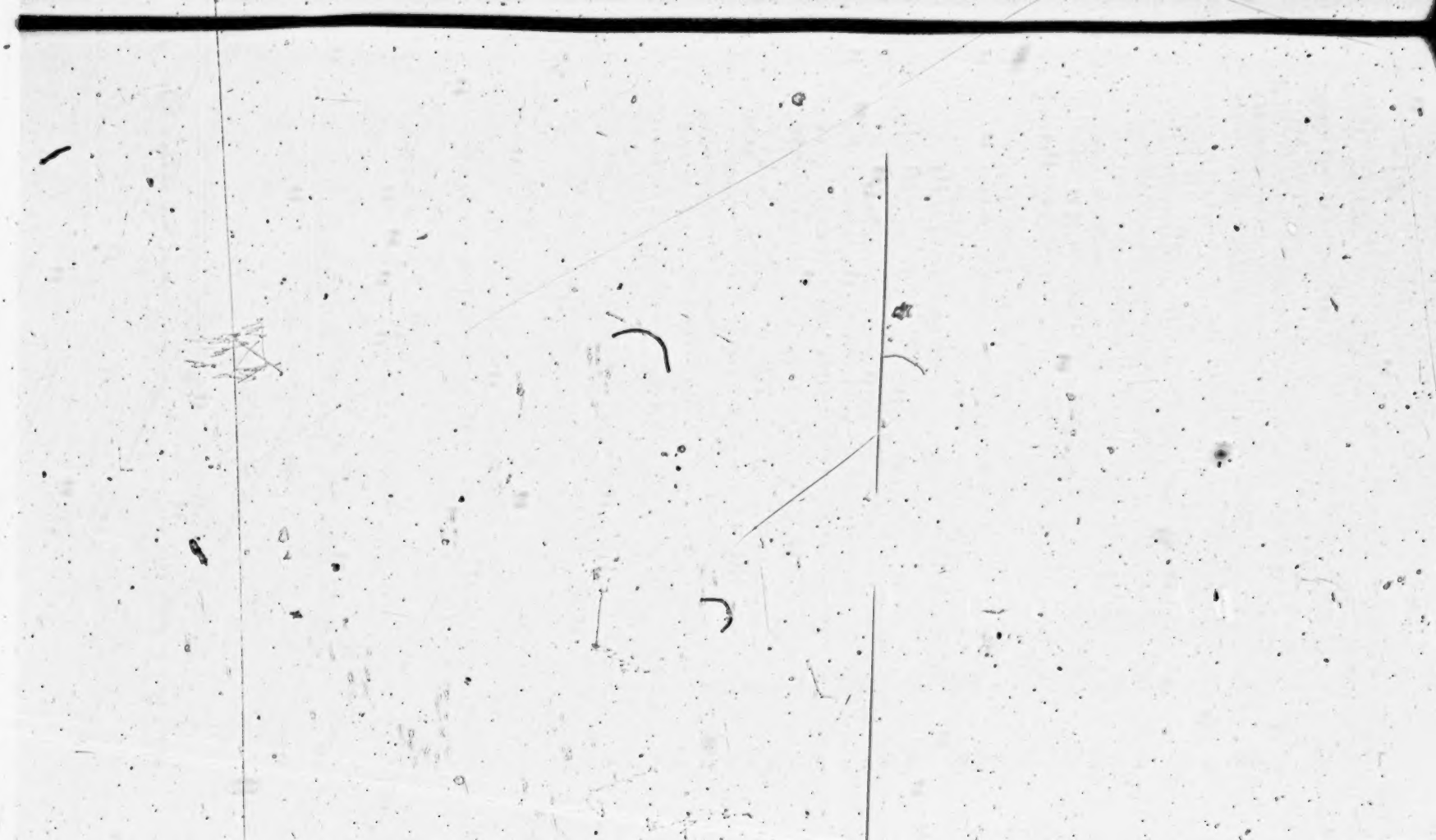

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM JACOB, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Appellee

STATEMENT ON APPEAL

This suit was instituted by the service of a summons and complaint on January 31, 1939, upon The City of New York in the District Court for the Southern District of New York after plaintiff had served a notice of claim and intention to sue, the notice having been served upon the defendant, and the City Comptroller on November 28th, 1938.

The action was brought by the plaintiff to recover damages for personal injuries and maintenance and cure by reason of the said injuries sustained while in the defendant's employ on board its ferryboat "Dongan Hills" on or about October 4th, 1938.

The case was tried before Honorable Isaac M. Meekins, District Judge, and a jury (plaintiff demanded jury trial) on February 29th and March 1st, 1940. Plaintiff rested, except for the admission of medical evidence, and the Court [fol. 2] on motion of defendant dismissed the complaint. The judgment was entered on April 5th, 1940.

The notice of appeal was filed in the office of the Clerk of the District Court on May 2nd, 1940.

The plaintiff's attorney of record is Silas B. Axtell.

The defendant is represented by William C. Chanler, Corporation Counsel of the City of New York.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM JACOB, Plaintiff,
against
THE CITY OF NEW YORK, Defendant

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Silas B. Axtell, plaintiff's attorney, whose address is 80

Broad Street, New York City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day [fol. 3] of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Charles Weiser, Clerk of the Court. [Seal of the U. S. District Court.]

Dated, January 30, 1939.

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.)

IN THE UNITED STATES DISTRICT COURT

COMPLAINT

Plaintiff above named, by Silas B. Axtell, his attorney, complaining of the above named defendant, alleges, upon information and belief, as follows:

For a First Cause of Action:

First.—The plaintiff is and for some time past has been a resident of the Southern District of New York.

Second.—The jurisdiction of this Court is predicated upon a Federal Statute, namely, the Jones Act, Section 688, Title 46, U. S. C. A., and the General Maritime Law of the United States.

[fol. 4] Third.—That the defendant, The City of New York, is a municipal domestic corporation, duly organized and existing under and by virtue of the laws of the State of New York and has an office and place for the regular transaction of its business within the Southern District of New York.

Fourth.—That at and during all the times hereinafter mentioned, the defendant owned, operated, managed and controlled a certain ferryboat known as the ferryboat "Dongan Hills".

Fifth.—That at and during all the times hereinafter mentioned, the plaintiff was in the employ of the defend-

ant, in the capacity of a water tender at the rate of wages of $2,195.00 per year.

Sixth.—That the plaintiff at and for some time prior to the date hereinafter mentioned was in the employ of the defendant in the capacity and at the rate of wages aforesaid, to perform duties on various ferryboats of the defendant including the ferryboat "Dongan Hills".

Seventh.—That on or about the 4th day of October, 1938, the aforesaid ferryboat was lying in the navigable waters of the United States at #3 slip, South Ferry, Manhattan.

Eighth.—That on the aforesaid date, while the ferryboat was at the place aforesaid, plaintiff was changing oil strainers, and, while in the course of his said employment, suddenly and without notice the wrench with which he was working slipped and plaintiff was caused to be precipitated from and fall off a platform striking and landing on a catwalk or grating with such great force and violence as to sustain serious, severe and permanent personal injuries.

[fol. 5] Ninth.—That the plaintiff thereby became sick, sore, lame and disabled; has been and will be confined to his home and bed; has suffered and still suffers great pain and agony; has been and will be prevented from working; has lost and will have to lose large sums of money which he otherwise would have earned; has paid out and will have to pay out large sums of money for his medical and surgical treatment and attention, for medicines and for his board and lodging, all to his damage in the sum of $5,000.00.

Tenth.—That the said injuries sustained by plaintiff were not due to or caused by any fault or want of care on his part, but were due to the unseaworthiness of the vessel and the negligence of the defendant, its agents, officers and employees; that the defendant failed to provide plaintiff with a safe and seaworthy vessel and with a safe and proper place in which to work, and it failed to keep the vessel, its gear, appliances, equipment and devices in a safe and proper condition and in a sane and proper state of repair; that the said ferryboat, its gear, appliances, tools and devices were old, worn and defective, and unfit for use; that the defendant failed to take such care and caution as was necessary to protect the safety of plaintiff's life and limb.

Eleventh.—That the plaintiff has given the defendant due notice of his claim and demand of intention to commence suit against it in accordance with the provisions of the New York City Charter; that the prescribed time for the defendant to adjust the claim has elapsed and the defendant has failed, neglected, omitted and refused to make an adjustment or payment thereof within thirty days after the presentation of such claim.

[fol. 6] Twelfth.—That by reason of the foregoing, the plaintiff has been damaged in the sum of $5,000.00

For a Second Cause of Action:

Plaintiff reiterates, repeats and realleges each and every allegation and all the facts hereinbefore set forth and with the same force and effect as though fully set forth herein.

Thirteenth.—That under the General Maritime Law plaintiff is entitled to his maintenance and cure and to his hospital bills for a reasonable period of his disability, and to his wages to the end of the voyage in the further sum of $3,000.00.

Fourteenth.—That by reason of the foregoing, the plaintiff has been damaged in the sum of $3,000.00.

Wherefore, plaintiff demands judgment against the defendant in the sum of $5,000.00 on the first cause of action and in the sum of $3,000.00 on the second cause of action, together with the costs and disbursements of this action.

Silas B. Axtell, Attorney for Plaintiff, Office and P. O. Address, 80 Broad Street, Borough of Manhattan, New York City.

(Verified by plaintiff on January 25, 1939.)

[fol. 7] In the United States District Court

Answer

The defendant, answering the complaint herein:

As to the First Cause of Action:

First.—Denies having any knowledge or information thereof sufficient to form a belief as to any of the allega-

tions contained in the paragraphs designated "First", "Eighth" and "Ninth".

Second.—Denies each and every allegation contained in the paragraphs designated "Tenth" and "Twelfth".

Third.—Denies each and every allegation contained in the paragraphs designated "Eleventh", except that plaintiff herein by a paper writing purporting to be a notice of claim and of intention to sue, which was presented to the Comptroller of the City of New York for adjustment and served upon the Corporation Counsel of the City of New York thereby gave notice to the defendant, The City of New York, of his intention to commence an action against it, that more than thirty days have elapsed since such presentation and no adjustment thereof has been made.

As to the Second Cause of Action:

Fourth.—Denies each and every allegation contained in the introductory part thereof, except as otherwise pleaded herein.

Fifth.—Denies each and every allegation contained in the paragraph designated "Thirteenth", except that pur-
[fol. 8] suant to the Laws of the United States of America, a seaman who becomes ill or is injured in the service of the vessel upon which he is then serving is entitled to maintenance and cure (including medical attention) and wages to the end of the voyage.

Sixth.—Denies each and every allegation contained in the paragraph designated "Fourteenth".

As a Separate and Distinct Defense Thereto, Alleges:

Seventh.—That any damages suffered or sustained by the plaintiff herein were not suffered or sustained through any negligence on the part of the defendant, its agents, servants, or employees, but were suffered or sustained through the negligence of the plaintiff or through the intervention of a cause or causes over which the defendant, its agents, servants or employees had no control or in no wise are or were responsible therefor.

Wherefore, the defendant demands judgment dismissing herein, with costs.

William C. Chanler, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

(Verified by Russell Lord Tarbox, Acting Corporation Counsel, on March 13, 1939.)

[fol. 9] IN THE UNITED STATES DISTRICT COURT

JURY DEMAND—January 17, 1939

Sir:

Please Take Notice, that the plaintiff above named demands a jury trial in the above entitled action.

Dated, New York, January 17th, 1939.

Yours, etc., Silas B. Axtell, Attorney for Plaintiff, Office & P. O. Address, 80 Broad Street, New York City.

To: William C. Chanler, Esq., Corporation Counsel, Attorney for Defendant, Municipal Building, New York City.

IN THE UNITED STATES DISTRICT COURT

BILL OF PARTICULARS—June 22, 1939

Plaintiff, through his attorney, Silas B. Axtell, answering defendant's attorney's demand for a bill of particulars, alleges upon information and belief as follows:

(a) October 4th, 1938, at about 2:00 P. M.

(b) In the boiler room of the ferryboat "Dongan Hills", docked at Slip 3, South Street, Battery.

[fol. 10] (c) The defendant, its agents, officers and employees failed to provide plaintiff with a proper and safe staging on which to work; that the said staging was unsafe and unsecure; that the wrench which the plaintiff was using was old, worn, and defective; that the ferry was not equipped with a proper and safe wrench; that the vessel was not kept, maintained in a safe and proper state of re-

pair, nor was the same equipped with sufficient and proper tools and devices.

(d) and (e) That the chief engineer in charge had knowledge of such condition for a long period of time.

(f) 7th, 8th and 9th ribs fractured, 10th and 11th badly bruised.

(g) Plaintiff was treated at the hospital on October 4th, 1938 and confined thereto from October 4th to October 15th; confined to house from October 15th to November 9th, 1938, when he returned to work.

(h) From October 4th, 1938 to November 9, 1938. Watertender on ferryboat.

(i) 1. About $5.00 for medicines.
2. $252.00.
3. None.
4. None.

Dated, New York, June 22nd, 1939.

Yours, etc., Silas B. Axtell, Attorney for Plaintiff, Office & P. O. Address, 15 Moore Street, Borough of Manhattan, City of New York.

[fol. 11] To: William C. Chanler, Esq., Corporation Counsel, Attorney for Defendant, Municipal Building, New York City, New York.

IN THE UNITED STATES DISTRICT COURT

JUDGMENT—April 5, 1940

The issues in this action having been duly tried before Hon. Isaac R. Meekins, District Judge and a jury, at a stated term of this Court, held in and for the Southern District of New York, at the new Federal Court House, in the Borough of Manhattan, City of New York, on the 29th day of February and the 1st day of March, 1940, and the complaint having been dismissed at the close of the plaintiff's case as to the first cause of action and the defendant having offered to consent to the entry of judgment in the sum of $214.37 on the second cause of action and this offer having been refused by the plaintiff and the complaint having thereafter been dismissed as to the second cause of

action and the costs of the defendant having been duly taxed at the sum of $30.00,

Now, on motion of William C. Chanler, Corporation Counsel, attorney for defendant, it is

Adjudged, that the complaint be and the same hereby is dismissed on the merits, and it is further

[fol. 12] Adjudged, that the defendant, The City of New York (Municipal Building, Borough of Manhattan, New York City), recover of the plaintiff, William Jacob (701 East 163rd Street, Bronx, N. Y.), the sum of $30.00, costs as taxed and that said defendant have execution therefor.

Dated, April 5, 1940.

George J. H. Follmer, Clerk.

IN THE UNITED STATES DISTRICT COURT

Case Containing Exceptions

Before Hon. Isaac M. Meekins, District Judge and a Jury.
New York, February 29, 1940, 10:30 A. M.

APPEARANCES:

Silas B. Axtell, attorney and counsel for plaintiff.

William C. Chanler, Esq., Corporation Counsel, The City of New York, attorney for defendant; Alfred T. White, Esq., Assistant Corporation Counsel, of counsel.

(A jury was duly impaneled and sworn.)

Mr. Axtell: Has the City produced the wrench?

Mr. White: No. We are unable to.

[fol. 13] Mr. Axtell: I move to strike out the answer of the defendant. We served notice to produce this wrench, and that in default thereof we would so move.

Mr. White: The wrench is in the bilge of the "Dongan Hill" and we would have to put the ship in drydock to get it. We have not been able to get it.

The Court: The motion is overruled.

Mr. Axtell: Exception.

(Mr. Axtell opened the case to the jury on behalf of the plaintiff.)

(Mr. White opened the case to the jury on behalf of the defendant.)

WILLIAM JACOB, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Axtell:

Q. Mr. Jacob, you are the plaintiff in this case?
A. I am.
Q. You spell your name J-a-c-o-b?
A. Yes.
Q. Are you married?
A. Yes.
Q. Have you a family?
A. Yes, sir.
Q. You work on the City ferries?
A. Yes, sir.
Q. What do you do?
A. I am a water tender in charge of the fire room.
Q. That is different from the engine room?
A. Altogether different.
Q. How long have you been in that service?
A. Twenty years.
Q. What are your wages?
A. We get paid for the time put in.
Q. If you work more than 8 hours do you get overtime?
A. No. If you work less than 8 hours you get docked.
[fol. 14] Q. How long have you been a water tender?
A. About ten years.
Q. Before that had you been a fireman?
A. Yes, sir.
Q. How old are you?
A. 45 years old.
Q. What were you doing on the 5th of October, or is it the 8th of October, 1938—October 4, 1938?
A. Changing oil strainer.
Q. What was your work on the ship?
A. A water tender.
Q. What was the boat you were working on?
A. The ferryboat "Dongan Hills".
Q. She is in the service between South Ferry and Staten Island?
A. Right.
Q. How old a boat is she?
A. I believe she has been in service about ten years.

Q. She has one engine?
A. No, she has got two engines.
Q. Has she one propeller at each end?
A. Yes, sir, one propeller at each end.
Q. But she has two engines?
A. All hooked on one shaft.
Q. How many water tenders are there on the boat?
A. Just one on each watch.
Q. You were working 8 hours on and 16 hours off?
A. That is right.
Q. On this date, October 4th, what time did you go to work?
A. About 1:30 P. M.
Q. What time did this accident happen?
A. About 2:30,—about 2 o'clock rather.
Q. Where was the boat when the accident happened?
A. No. 3 Slip South Street.
Q. That is South Ferry?
A. Yes, that is South Ferry.
Q. Was she in operation?
Q. Well, the other crew was just discharged and we were laying there to have the other crew come on and take her to the dock.
Q. She was in operation?
A. Oh, yes, sir, she was in operation.
[fol. 15] Q. How long had she come in from a trip to Staten Island just before the accident?
A. I believe she got in at 1:30.
Q. What were your duties as a water tender?
A. To keep everything right in the boiler room.
Q. How many boilers?
A. There were four boilers.
Q. In two fire rooms?
A. Just one.
Q. Is that in the center of the ship?
A. She is more inclinded to be toward the New York end.
Q. I suppose it is pretty difficult to know just which is the front and back end of a ferry boat.
A. Yes, I believe it is.
Q. Do you have a way of telling?
A. We have our port and starboard sides.
Q. Which is the stern end, the New York end or the Staten Island end?
A. The New York end.

Q. She always ran that way, did she, one particular end always making the slip at New York?

A. No; they can head for the slip either end to.

Q. But she did go that way?

A. Yes.

Q. So the New York end was the stern end.

The Court: Where do you live?

The Witness: In the Bronx.

Q. Was the New York end the stern end?

A. Not all the time.

Q. What part of the boat were you working in when you got hurt?

A. In the boiler room.

Q. What part of the boiler room?

A. The starboard side.

Q. What were you doing?

A. Changing an oil strainer.

Q. How do you do that?

A. By the head of a manifold and taking one strainer out and putting in another.

Q. What is the manifold?

A. It is a vessel containing more than one strainer.

[fol. 16] Q. Motorists and most people having motor cars to them a manifold means something else. You say on that ship it was something connected with the oil?

A. On that particular ship.

The Court: You opened it up to clean it out.

The Witness: Yes.

Q. You had to do something with the strainer?

A. Yes, sir.

Q. How many bolts or nuts did you have to move to take off the strainer?

A. Six.

Q. What did you stand on doing that?

A. We had a platform there about 18 inches square.

Q. How high?

A. About 18 inches off the catwalk.

The Court: The standing room is 18 inches square?

The Witness: Yes.

Q. You mean it was a square box 18 inches square?

A. Yes.

Q. Was it stationary or not?
A. It was stationary.
Q. Built there?
A. Yes.
Q. What was the top of it made of where you were standing?
A. Corrugated steel.
Q. What were you wearing on your feet?
A. Leather shoes.

The Court: Did you have on any socks?
The Witness: I did.

Q. And you were using a wrench when something happened?
A. That is right.
Q. What happened?
A. In taking off these bolts and putting them on they have to be very tight, and I put a strain on them and the [fol. 17] wrench slipped and I had nothing to grab and I fell and hit an angle iron.
Q. Will you describe that wrench?
A. The wrench was well worn.
Q. What do you mean?
A. It had seen a lot of service. It had a lot of play on it.

By the Court:

Q. How long had you worked at that particular platform?
A. About 10 or 15 minutes.
Q. I mean your experience there. How well acquainted were you with that place?
A. Oh, I had worked there about three weeks.
Q. Working right there?
A. On that boat.
Q. I am speaking about the position you were in where the wrench slipped. Were you there every day?
A. No; I would be there on the average of three times a week.
Q. Were you the only one to clean strainers?
A. The water tender on the other watch did also.
Q. You would do it three times a week?
A. Yes; when I was on the day watch.

Q. You had done this three times a week for two or three weeks before the accident?

A. We used to alternate. When on the 2 to 10 watch we would take care of the strainers.

Q. Were you familiar with this place?

A. Yes.

By Mr. Axtell:

Q. Do you blame anything for this accident except the condition of the wrench?

A. Only the wrench.

Q. That is all. Describe the wrench. How long was it and what size nut did it fit?

A. It would fit a ¾ stud nut.

[fol. 18] Q. I show you a nut; is that a ¾ stud nut?

A. It is.

Q. That nut fits a ¾ stud?

A. Yes.

The Court: You were trying to remove that?

The Witness: I was trying to tighten it up.

Q. (Handing) This is a wrench that it says is 1¼ in the opening in one end and 1⅛ at the other. That is a Williams drop forge straight end wrench No. 37, purchased at Patterson Brothers a few minutes ago on Park Row. Is that the type of wrench you had?

A. It is an open end, only mine was an S-shape.

Q. The end was like this?

A. Similar, yes.

The Court: Was there anything wrong with the wrench except at the end?

The Witness: It was very loose.

The Court: A loose fit?

The Witness: Yes, sir.

Q. What is this I show you?

Mr. White: I object to this other kind of a wrench that Mr. Axtell now has.

Mr. Axtell: I propose to show that this is the proper wrench to use, built by the manufacturers of the bolt and built for that purpose.

Mr. White: I object to such statements as improper.

The Court: We are trying this case on the wrench he did have.

Mr. Axtell: We say they failed to furnish proper tools and equipment.

The Court: You may show that, but not by using some other kind of a wrench.

[fol. 19] Q. Was there any other wrench on the boat that would fit that stud?

A. Not that I know of.

Q. Did you make inquiries to get a better or another wrench?

A. I did.

Q. From whom?

A. The chief engineer.

Q. Did you show him the wrench you had been using?

A. No. I told him the wrench I had was very bad.

Q. What did you tell him exactly?

A. I told him I would like to have a new wrench.

Q. What did he say?

A. He said for me to look in the tool closet and see if there was one in there; and I went up there and couldn't find any and I believe he said he sent an order out for one.

Q. How long before that, before the accident, did you report that?

A. I guess two or three days before.

The Court: Had the wrench been slipping before that?

The Witness: Yes, she was.

Q. Where were the tools kept on this ship?

A. In the engine room.

Q. Was there a place for them?

A. There was a tool locker there.

Q. What do they call it?

A. A tool locker.

Q. Anybody in charge of it?

A. Well, the chief engineer, I suppose.

Q. On a big ship they have a storeroom and have a man in charge of the tools and he checks out everything.

A. No, there was nobody in charge.

Q. It was just a place where tools were supposed to be put when not in use?

A. Yes, sir.

Q. You looked over all they had there?

A. I did.

Q. You found no end wrench?

A. That is right.

[fol. 20] Q. What about socket wrenches of this type (indicating); were there any socket wrenches that would fit that 1¼ inch nut?

A. None that I seen.

Q. There were not. Did you ask the engineer for a socket wrench?

A. Not a socket wrench. I just asked for a new wrench.

Q. What is a socket wrench?

A. A wrench where the nut is inserted right into the wrench.

Q. Do you see anything around here that looks like a socket wrench?

A. There is one on the table.

Mr. White: I object to that and move to strike it out.

The Court: I will rule that out. He said he didn't ask for one of that kind. He asked for a new wrench.

Q. Was the subject of a socket wrench mentioned?

Mr. White: That is objected to.

The Court: Yes, it is leading.

Mr. Axtell: I direct your Honor's attention to the 10th paragraph of the complaint in which it is alleged, "That the said injuries sustained by the plaintiff were not due to or caused by any fault or want of care on his part, but were due to the unseaworthiness of the vessel and the negligence of the defendant, its agents, officers and employes; that the defendant failed to provide plaintiff with a safe and seaworthy vessel and a safe and proper place in which to work, and it failed to keep the vessel, its gear, plant, equipment and devices in a safe and proper condition and in a safe and proper state of repair; that the said ferryboat, its gear, appliances, tools and devices were old, worn and defective [fol. 21] and unfit for use; that the defendant failed to take such care and caution as was necessary to protect the safety of plaintiff's life and limb."

Mr. White: Mr. Axtell has stated that the only basis of his claim is on the wrench.

Mr. Axtell: Yes.

The Court: Well, then get right to the wrench.

Q. Have you a general knowledge of the kind of wrenches that are usually provided for removing nuts on studs?

Mr. White: I object to that, your Honor.

The Court: I will overrule that. He may tell his knowledge.

Q. Didn't you hear the question?

A. I thought it was ruled out.

The Court: Go ahead and answer.

A. Yes, I am familiar with the wrenches.

Q. What kind are usually used for removing studs on strainers and cylinder heads?

Mr. White: That is objected to as incompetent, irrelevant and immaterial, as to what is usually used.

The Court: Do you know?

The Witness: Yes; a straight open end wrench.

Mr. Axtell: I offer this stud and wrench to be marked for identification.

(Marked Plaintiff's Exhibits 1 and 2 for identification.)

The Court: If you desire to do so it may be marked as illustrating the witness's testimony.

[fol. 22] Q. I want you to take this open end wrench and just show the jury, using that to illustrate with, what you say was the matter with the other wrench?

A. There was play in the jaws; it was worn.

Q. How much play was there?

A. A sixteenth of an inch.

Q. How did you go about what you were doing?

A. I got a grip with my wrench on the nut and I put a slow strain on it and then got harder and harder.

Q. And what happened?

A. It slipped.

Q. When it slipped what happened to you?

A. I lost my balance and went off the platform and found myself in the passageway.

Q. What did you strike against?

A. An angle iron.

Q. What is an angle iron?

A. It is alongside the passageway, over the edge.

Q. What is an angle iron?

A. It is an iron with three angles.
Q. A crooked or bent iron?
A. Yes.
Q. You mean by that an elbow, don't you?

The Court: Not necessarily. It seems to me angle iron speaks for itself.

Q. How wide was the angle iron?
A. About 3 inches.
Q. How long was this piece?
A. She goes along the passageway, that is right on the end.
Q. On the floor?
A. No; along the end of the passage.
Q. On the deck?
A. I am up on the catwalk. It is right on the edge and the purpose of it is that nobody can slip off it.
Q. What part of your body came in contact with that?
A. My right side.
Q. Did you feel anything?
A. Oh, yes, severe pain.
Q. Were you able to get up?
A. With the assistance of one of the men I was working with.
[fol. 23] Q. Is the man in court?
A. Yes, sir, Mr. Caston.
Q. Which is Mr. Caston?
A. That one standing up.
Q. He was nearby at the time?
A. He was.
Q. What was his job?
A. Cleaning burners and the like.
Q. Is he a fireman?
A. Yes, he is a fireman.
Q. What did you do after that?
A. He assisted me to the floor and I sat down until I got my breath. It took about 15 minutes, and then I reported to the chief engineer.
Q. How far did you fall from the place you were standing on?
A. The platform is 18 inches plus my own height.
Q. In other words, the thing you fell on was on a level with the base of the platform?

A. No; it was 18 inches above what I fell on.

Q. The top of the platform was 18 inches above the thing you fell on?

A. That is right.

Q. So it was like if you were standing here, you went right down?

A. Yes sir.

Q. Was your arm extended?

A. I tried to protect myself, but there was nothing there to grab.

Q. What was done with you after that?

A. I reported into the chief engineer and I told him I had a bad fall, and he asked me if I wanted first aid and I said yes. I said, "I think if you strap me up a bit I will be all right in an hour."

Q. Did they call somebody?

A. No; he dressed me himself.

Q. On the ship?

A. On the ship.

Q. And you continued on duty all day?

A. No. I went about two hours longer and then I couldn't stand it any more.

Q. You had pain all the time?

A. Constant pain.

Q. Describe the pain, where it was.

A. My whole side. I could hardly breathe.

Q. You had difficulty in breathing?

A. It was very hard, and it hurt.

[fol. 24] Q. Were you able to work?

A. There wasn't very much I could do. We went to the oil docks to fill up.

Q. How soon after you were hurt did you go over there?

A. About 15 minutes, I should judge.

Q. What did they do with you then?

A. Well, I was trying to do whatever I can so far as watching the water and so forth, and when we came to New York, and then we went to St. George, and I asked the fireman to put somebody in my place.

Q. How did you get out of the fireroom?

A. I climbed up a ladder.

Q. What kind of a ladder, a perpendicular ladder?

A. She is at an angle.

Q. With rungs in it?

A. Yes.
Q. A rail on the side?
A. Yes.
Q. It is a pretty steep ladder?
A. Not that one.
Q. It is not the one you go down to the hold on in a boat?
A. No, sir.
Q. Were you taken to the hospital?
A. I was.
Q. Did an ambulance come?
A. They got a car, one of the cars from the department.
Q. To what hospital did they take you?
A. The Marine Hospital.
Q. At Stapleton, Staten Island?
A. Yes sir.
Q. What did they do for you there?
A. They strapped me up again.
Q. Did they X-ray you?
A. No; the doctor said the X-ray room was closed right at that time.

Mr. White: I move that that be stricken out.
Mr. Axtell: I consent.

Q. They didn't X-ray you that day?
A. They did not.
Q. Did they put you to bed?
A. I wanted to go home and they told me——
[fol. 25] The Court: Did you go home?
The Witness: Yes, sir.
The Court: And you came back when?
The Witness: Next morning.

Q. How did you feel that night?
A. It took quite a while to get to sleep, but when I got to sleep I was all right.
Q. Did you have pain?
A. Going to sleep, yes.
Q. Did you go to a doctor?
A. No.
Q. You went back to the hospital when?
A. The next morning.
Q. Why?
A. Well, I had an arrangement there.

Q. Did they X-ray you then?
A. They did.
Q. Did they do anything further to you?
A. They put me in bed.
Q. How long were you in bed?
A. Three weeks.
Q. How long did you stay in the hospital?
A. The day they let me go out they gave me a temporary total disability.
Q. After you left the hospital how did you feel?
A. I didn't feel too good.
Q. What did you do, stay home for a while?
A. I had to.
Q. Were you confined to the house?
A. I was.
Q. How long?
A. About three more weeks.
Q. You didn't do any work?
A. No.
Q. Then what did you do, did you return to duty?
A. Yes.
Q. You went back to the ferry?
A. Back to the ferry.
Q. How long were you out of work that you didn't get wages?
A. About six weeks or more.
Q. Then when you did return to work how did you feel?
A. I didn't feel too good.
Q. How are you now, do you feel any trouble, any pain?
A. When I overtax myself.
[fol. 26] Q. What is the effect?
A. I feel as if something was pulling away. I feel pain there when I overtax myself.
Q. When you undertake strenuous work you find what?
A. I get a pain.
Q. You were indicating on your right side?
A. Yes, sir, on my right side.
Q. You were informed you had some injury to your ribs or something?
A. I was.

Mr. White: That is objected to and I move to strike it out, what he is informed.
The Court: I think I will leave that in.

Mr. Axtell: I have a transcript of the hospital record. I suppose there is no objection to my offering them.

Q. Did you have any limitation of motion of your arm or body?

A. No.

Q. Is your strength impaired in any way?

A. Only to the extent that when I work a little too hard I don't feel the way I usually should.

Q. Did you go to collect or try to collect your wages from the time away from work?

A. I did.

Q. Whom did you go to?

A. To the Corporation Counsel, and I went into information and he sent me into the doctor, and the doctor told me to take off my shirt and he looked me over and he said to come back in a couple of days, and I went back about four times, and I says, "Well, Doc., up to now?"——

Mr. White: I object to the conversation.

Q. Did they ever offer to pay you wages?

A. No.

Q. Did you ask for them?

A. I did.

[fol. 27] Q. With reference to this wrench, where is that straight end wrench—was it just like that straight end wrench or different?

A. It was an S-wrench.

Q. You mean it had a crook in it?

A. Yes.

Q. Will you draw a picture of an S-wrench? Hold it up here a minute. How about this surface of it (indicating)?

A. Somewhat bent there.

Q. It had a bend in it?

A. Yes.

Q. In what way was it bent? You have indicated something with your fingers.

A. That way.

Q. You mean you put the wrench on the level like on this board, one end would be raised?

A. Yes, sir.

Q. It had a bend in the middle as well as the S-part?

A. That's right.

Q. It was bent two ways, to be something like a socket wrench?

A. I don't know what the idea of it was.

Q. Did you need a socket wrench for that job?

A. A socket wrench could be used very handy.

Mr. White: That is objected to as calling for a conclusion.

The Court: Objection sustained.

Cross-examination.

By Mr. White:

Q. As a matter of fact you were only in the hospital ten days?

A. More than that, sir.

Q. I call your attention to this testimony which you gave under oath January 10, 1939, at your examination before trial. I ask you if you were asked these questions and gave these answers:

"Q. How long were you in the Marine Hospital?

"A. Ten days."?

Is that what you said?

A. Yes. I went in there; I was admitted the 5th,—reported the 4th, admitted the 5th, and discharged with a temporary disability the 15th.

[fol. 28] Q. And they told you you would be all right in three weeks?

A. Well, I had to report for treatments.

Q. As a matter of fact you went back to work the 10th of November?

A. I did.

The Court: When were you hurt?

The Witness: The 4th of October.

Q. And your wages were $7 a day and you worked six days a week?

A. That is right.

The Court: Did you have any doctor's bills to pay?

The Witness: No, sir; the Marine Hospital took care of that.

The Court: You just lost the time at $7 a day?

The Witness: That is right.
The Court: Six days a week?
The Witness: That is right.

Q. You didn't have any private doctor at all, did you?
A. No, I did not.
Q. Now as water tender you were in charge of the boiler room there?
A. That is right.
Q. And it was up to you to keep things in order and to get the equipment you needed, that was your job?
A. That is right.
Q. And if you didn't have any equipment that was needed, there was a regular way of requisitioning that?
A. Reporting it to the chief.
Q. The chief engineer had a set of tools besides yours, didn't he?
A. He did.
Q. And if it was necessary at any time, you could use his tools to do this work if it became necessary?
A. If he had them.
[fol. 29] Q. On this day he had a whole set of tools and wrenches, didn't he?
A. No.
Q. Did you look in his tools?
A. I did.
Q. And you didn't find any wrenches?
A. Not one to fit.
Q. What kind of wrenches did he have there?
A. I guess he had various sizes.
Q. He had a Stillson wrench?
A. I don't know if he did or not.
Q. That is one thing you overlooked?
A. I don't know.
Q. He had adjustable wrenches, end wrenches, adjustable ones?
A. No, he didn't.
Q. You don't know about that?
A. No, he didn't have that; they didn't come on the boat.
Q. Did he have what is commonly called monkey wrenches?
A. I believe he did.
Q. Of course, you can use that on any nut?
A. Probably.

Q. You have used them lots of times yourself, haven't you?

A. Yes.

Q. You have used monkey wrenches and Stillson wrenches lots of times on all kinds of nuts, haven't you, and you say this nut was just like the nut you were working on?

A. Yes, sir.

Q. There is nothing peculiar about this nut from any other nut that it cannot be turned with a monkey wrench or Stillson wrench?

A. I inquired for a wrench.

Q. He had them there?

A. I don't think he did. If he did he didn't give me any.

Q. What time of day did you ask for a wrench?

A. That particular day I didn't ask. I was in there various times.

The Court: You mean the day you got hurt you didn't ask?

The Witness: No, sir; I used that wrench.

[fol. 30] Q. When do you say you asked for a wrench before that, if at all?

A. The time before when I was working on that particular job, about two days before.

Q. Where did you talk to the chief engineer?

A. In the engine room.

Q. You mean he was in his place?

A. In his place.

Q. Where he kept his tools?

A. I don't know where he keeps his personal tools.

Q. I am referring to the ship's tools for the engineer.

A. Yes, sir.

Q. There were several sets of tools on the boat?

A. I wouldn't say that.

Q. How often did you dock at the New York end and Staten Island end of the ferry?

A. Oh, an average of six or seven times each day.

Q. And you could have sent out for a wrench; if it was badly needed you could have sent out for a wrench several times a day?

A. Yes, if they have them in the storeroom.

Q. They have a storeroom with a full assortment of tools?

A. I don't know what they have got out there.
Q. You didn't go into that?
A. All I am supposed to do is to order.
Q. Of course, this end wrench that you had been using before and you used on this day, had been used to take the strainer on and off several times before?
A. It had.
Q. You say you were putting a great deal of strain on this nut, is that right?
A. Yes, sir.
Q. Did you brace yourself against anything when you pulled on the wrench?
A. I did have an iron rod there.
Q. You mean one of the pipes right next to the wall?
A. It is a strongback.

Mr. Axtell: I move to strike out the pipes against the wall.

[fol. 31] Q. There were pipes against the wall?
A. I was not near the wall.
Q. There were no pipes near the wall?
A. I was not near a wall.
Q. How far were you off from the wall?

The Court: He says he was not near a wall.

Q. How far were you from the wall?
A. The hull of the ship?
Q. Yes.
A. About 3 feet.
Q. And there were some pipes between you and the wall, weren't there?
A. Yes, there were.
Q. How far away were those pipes?
A. One or two feet from me.
Q. Were they on the same level with your feet or where?
A. A little above my head.
Q. What was it you braced yourself on when you put the strain on the wrench?
A. A rod coming down from the deck of the ship; I guess it was to hold the catwalk up.

The Court: Did you take hold of that?
The Witness: I did as far as I could reach. I braced myself.

Q. You didn't hold with your hand?

A. No, I was pressing myself against that.

Q. In your experience hadn't you found before if you put that much strain on a wrench on a nut it is very apt to slip, any wrench or any nut? Isn't that true?

A. Yes.

Q. And that is particularly true when the nut has been in use before and the wrench has been in use before?

A. That is true.

Q. That is the usual course of experience, isn't it?

A. That is right.

[fol. 32] Q. Nothing odd about that. As a matter of fact, you have worked around machinery for how long?

A. About 20 years.

Q. And this is not the first time you have had a wrench slip off a nut?

A. Probably not.

Q. It happens all the time; it happens every so often, doesn't it?

A. Oh, no.

Q. Well, wrenches slip off nuts for a number of reasons?

The Court: You have been over that. He says they do.

Q. How many times did you change the wrench on the nut while you were tightening it up?

A. I got about four tightenings before the thing slipped.

Q. In other words, you turned it so far and put it back on and turned it again?

A. Yes.

Q. How much thread was there on this bolt?

A. Abont ⅝.

Q. ⅝ths of an inch?

A. Yes, sir.

Q. Was there as much thread as there was on this bolt you have in front of you—I mean the nut?

A. Just about.

Q. So in all you changed your wrench on the——

The Court: He said he did four times at least.

Q. Four or five times?

A. Yes.

Q. Did you do it four times before you put it on the last time?

The Court: That is what he said.

Redirect examination.

By Mr. Axtell:

Q. How about these wrenches which go clear around the nut, the end wrenches; did they have any of those aboard?

A. No.

[fol. 33] Q. You know what I mean, such as I have shown you?

A. You mean a ratchet wrench?

Q. Yes.

A. No, there were none of those on board.

Q. How many times before this accident had you requested the engineer for a wrench?

Mr. White: Objected to as repetition.

The Court: Go ahead.

Q. How many times before had you asked for a wrench?

Mr. White: That is objected to.

The Court: I will let you ask.

A. I should judge three times.

Q. How long had you been on the boat when you asked the first time?

A. Well, the first opportunity I had to change the strainer.

Q. The first time you used it?

A. The first time I used it.

Q. When was the next time after that?

A. When I had to use it.

Q. And none was provided?

A. No, not up to that.

Q. How much play was there in that wrench?

The Court: He said about a sixteenth of an inch.

Q. When you put the wrench on there——

The Court: He has answered that, about a sixteenth of an inch.

Q. Assuming your wrench was on as I have it on the nut, how much would it move back and forth?

A. About 1/16th in here.

[fol. 34] Q. How much would the handle move back and forth?

, A. I would say about an inch, from the length of the wrench I had.

Q. How long was the wrench?

A. About 18 inches.

The Court: Have you any further evidence to offer, Mr. Axtell, about the wrench?

Mr. Axtell: Not that particular wrench. I have an expert.

Edward F. Drolette, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Axtell:

Mr. Axtell: I offer this transcript of the hospital record.

Mr. White: I object to it as incompetent, irrelevant and immaterial. In the first place, it is only a copy, and in the second place it is not admissible in evidence. I will concede the man went into the hospital; there is no question about that. But under our law as followed by the federal courts, hospital records are not admissible in evidence.

The Court: I don't know about this. If this is a copy you will have to wait for the original anyway.

Mr. Axtell: I ask counsel to produce the transcript from his file.

Mr. White: Here it is, but I object to it on the same ground.

The Court: You say under the New York law that is not admissible.

Mr. White: Yes.

Mr. Axtell: The statute says it is admissible.

[fol. 35] The Court: What is the theory of it?

Mr. White: I will concede when he went into the hospital and when he left.

Mr. Axtell: These hospital records have been admitted in this court for 20 years, and I never heard them objected to by counsel before.

Mr. White: No, I do not think that is so.

Mr. Axtell: You haven't been here for 20 years.

Mr. White: I have been here quite often for the last few years.

Q. What is your occupation?
A. I am a marine chief engineer.
Q. What license do you hold?
A. Chief engineer's license.

Mr. Axtell: May I ask the plaintiff a question here?
The Court: Yes.
Mr. Axtell: Mr. Jacob, you may stay right where you are. Just tell us what type of burners and oil equipment was on this boat?
Mr. Jacob: The Todd system.

Q. How long have you been going to sea?
A. About 25 years.
Q. How long have you been licensed as a chief engineer?
A. About 20 years.
Q. How long have you had your chief engineer's license did you say?
A. 20 years.
Q. How old are you?
A. 41.
Q. You are mistaken about the date, aren't you? You didn't have a chief engineer's license that long?
A. I was the youngest chief engineer licensed in this country. I was 21 years old when I got it.
[fol. 36] Q. I thought you must have slipped up on your dates or your age or something. Pardon me. Well, how many different vessels have you worked on?
A. In that period of time I was at sea?
Q. Yes.
A. I should say about 200.
Q. Are you familiar with the Todd system of oil burners?
A. Very well.
Q. Are you familiar with the strainers Mr. Jacob has been talking about?
A. Yes, I am familiar with the strainers on the Todd system.
Q. And the studs they have to remove to change strainers?
A. Yes, sir.
Q. You have done that?
A. I have supervised the work.
Q. What is the usual method of removing those strainers?

Mr. White: I object to the usual method as immaterial and irrelevant.
The Court: Sustained.

Q. Is there any usual and customary way of removing strainers?

Mr. White: The same objection.

The Court: Sustained.

Mr. Axtell: Exception.

Q. Is there any general custom or practice with regard to the supply and use of tools for removing strainers in the Todd system?

Mr. White: The same objection.

The Court: Sustained.

Mr. Axtell: If your Honor please, the rule is well settled in this court in the case of DeVries v. Standard Oil, 3 Fed. [fol. 37] (2d), page 852 that evidence as to customary use and practice in machinery, appliances and gear is admissible, that is, evidence of general custom and practice.

Mr. White: Not in this class of cases.

The Court: No, sir; that is why I am holding this way. An exception to the plaintiff.

Mr. Axtell: We charge that they failed to furnish a proper tool and appliance, and I am trying to prove the kind of tool and appliance they should have used, which was not a straight end wrench.

The Court: I give you an exception.

Q. What are the sizes of straight end wrenches?

Mr. White: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained and the plaintiff has an exception.

Q. What is the difference between a straight end wrench and a socket wrench?

Mr. White: The same objection.

The Court: Sustained, and the plaintiff has an exception.

Q. I will ask you this question: Is it not true that ordinarily every engine room is equipped with a set of socket wrenches?

Mr. White: I object on the same grounds.

The Court: I sustain the objection with an exception to the plaintiff.

(No cross examination.)

[fol. 38] Mr. Axtell: I cannot proceed with the case if the federal government does not produce the hospital records.

The Court: What do you want to show by that, his trouble?

Mr. Axtell: Yes, sir.

The Court: Can't you stipulate that?

Mr. White: Yes, sir, three ribs fractured, ordinary fractures, and he was out from the 4th of October and went back to work on the 10th of November.

Mr. Axtell: And there was a compression of the chest.

Mr. White: If you want to go into details you will have to get the doctor.

The Court: That is not necessary in my view of the case.

Mr. White: I will concede that, but that is as far as I will go.

Mr. Axtell: I ask opportunity to find out why the doctor and hospital records are not here.

The Court: You can have the doctor here at the next session. I am going to adjourn at 12 o'clock.

Mr. Axtell: The plaintiff rests except as to his medical proof.

The Court: The plaintiff rests and reserves the right to introduce medical evidence if necessary later.

MOTION TO DISMISS COMPLAINT

Mr. White: At this time the defendant moves to dismiss the complaint upon the grounds that plaintiff has failed in his proof, has failed to introduce proof sufficient to constitute a cause of action.

The Court: As I understand, he alleges two causes of action.

[fol. 39] Mr. Axtell: For damages and maintenance and cure.

Mr. White: As to the loss of wages we have offered to settle them, and we will do that now.

The Court: You are now moving to dismiss the action, and the first cause of action is negligence.

Now put this down, Mr. Reporter: The defendant moves for judgment of non-suit on the first cause of action in this case.

ORDER GRANTING MOTION FOR NON-SUIT ON FIRST CAUSE OF ACTION

The motion is allowed and the plaintiff excepts.

Now as to the other cause of action you will have to try that out.

Mr. Axtell: Your Honor means that you do not allow the jury to pass on the question of the wrench?

The Court: No, sir; I am holding under the simple tool doctrine.

Mr. Axtell: I never heard of it.

The Court: Well, if you want them I will give you some cases.

Mr. Axtell: Well, your Honor, I have cases to the contrary.

The Court: The first case I have in mind is Newbern v. Great Atlantic & Pacific Tea Company. That is from the Fourth Circuit, and it is reported in 68 Fed. (2d), at page 525. I tried that case. And there are a number of other cases on the simple tool doctrine. That is why I didn't let this expert testify.

Mr. Axtell: It is contrary to the law as settled in this district.

The Court: It may be, but I have given you an exception to my ruling, and you may now travel along on the other causes of action. I have gone as far as I can with you. He knew just as much about that wrench as the ferryboat peo-[fol. 40] ple. He was familiar with it. It was an accident pure and simple. He didn't have to use it.

Mr. Axtell: Was he supposed to furnish his own wrenches?

The Court: No; but he had other wrenches. It was a simple tool.

Mr. Axtell: Your Honor doesn't suggest that a man should use a Stillson wrench?

The Court: Just let me read this to you. The simple tool or appliance doctrine is concisely stated in Newbern v. Great Atlantic & Pacific Tea Company. That is the case that I just gave you the citation of. In that case the Court said this:

"It is well settled that while it is the duty of the master in exercise of reasonable care for the safety of the employee to see that machinery and appliances which may cause injury to him are in reasonably safe condition. This duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects."

Now, in that case the plaintiff alleged that he was not furnished with a safe place to work and with safe and suit-

able appliances, in that a floor scale was defective, unsafe and dangerous. In particular it was alleged that the wheels were old, broken and in a dangerous and unsafe condition and not sufficient and adequate to enable the scale to be safely moved by the defendant's employees. The plaintiff was injured when one of the wheels came off, causing the right side of the scale to drop and the left side to rise. Now [fol. 41] it is an interesting feature of this case that the plaintiff stressed that the North Carolina law precluded the defense of assumption of risk, which defense, likewise, does not bar a suit by a seaman. The Court brushed aside the plaintiff's contention that the simple tool doctrine was but an application of the defense of the assumption of risk, and therefore could not be applied.

You have your exception.

Mr. White: The defendant consents to a judgment for loss of time which is the only damage shown by the plaintiff's testimony that he suffered which would be recoverable under the second cause of action, that is the loss of wages. There are no hospital bills or medical bills.

Mr. Axtell: The plaintiff refuses to accept any such judgment. You are applying a rule of North Carolina which does not apply here and I most heartily disagree with your Honor.

The Court: You have a right to do that.

Mr. Axtell: I did not mean to be disrespectful to your Honor, and if I was I apologize. I cannot see but that there is a question here for a jury. I really think under all the circumstances your Honor should grant a mistrial.

The Court: It is my view that this man cannot recover against the City of New York in view of the state of the record. As I say, I may be wrong, and if I am there is a circuit court that can correct my error.

Mr. Axtell: I would request your Honor to defer judgment until I submit authorities that I think are controlling.

The Court: Of course, I will be glad to hear any authorities that you have. I am going to leave here tomorrow and there is no session tonight.

[fol. 42] Mr. White: The proposition is so simple——

The Court: Mr. Axtell asks to be heard, and as a matter of courtesy I will hear him. If you have some citations that you wish to present, why, I will let you present them tomor-

row morning. The jury will be excused until tomorrow morning at 10 o'clock.

(Adjourned to March 1, 1940, at 10 A. M.)

New York, March 1st, 1940, 10:30 o'clock a. m.

Mr. Axtell: Will your Honor rule on my motion or does the ruling stand?

The Court: I will rule on both of them at the same time, and also I want to make some remarks to the jury.

On the question of the hospital records I did not exclude them on any theory except that the defendant was entitled to cross-examine the man who made them. In order for the Circuit Court to know what they contain the hospital records shall constitute a part of the record over the objection of the defendant.

Mr. White: I have no objection to them being marked for identification.

Mr. Axtell: I want them in evidence.

The Court: I will have to exclude them as evidence, but they can go to the Circuit Court that it may consider their contents and determine whether they should have been admitted. If the Circuit Court doesn't know what is in the records it would not know whether their contents were competent evidence.

At the close of the plaintiff's testimony, and after the plaintiff announced that he had rested, the defendant moved [fol. 43] for a judgment of non-suit, and the Court allowed the motion over the objection and exception of the plaintiff. Subsequently plaintiff's counsel asked the Court to hear argument at some length after preparation of a written memorandum on the question of striking out the Court's ruling granting the judgment of non-suit, and permitting the case to go in regular order to the jury for determination on the question of negligence. That is on the first cause of action set out in the complaint.

The Court took a recess at about noon on February 29th, 1940, and reconvened at 10 o'clock on Friday, March 1st. Counsel for plaintiff was recognized and stated he would need ten minutes to present his facts. The Court listened to his argument for a period of twenty-five minutes. At the close of the argument by plaintiff's counsel on March

1st defendant's counsel answered for a period of about ten minutes. Each side so far as the Court is advised had full opportunity to present its respective views as to the Court's granting of the motion for judgment of non-suit.

REMARKS OF COURT TO JURY

Now, ladies and gentlemen of the jury, I am unwilling for you not to be fully acquainted with the purposes which prompted the Court's rulings.

I am not troubled about the question of assumption of risk in this case. I do not think that doctrine applies. What troubles me about the case is the doctrine of simple tool. Of course that is not apparent to you, being laymen and not lawyers, but there is such a doctrine in the books, and there is a wealth of authority on both sides of the question. The plaintiff's counsel here has at length read extracts from the decisions which he says are in point in support of his position. Defendant's counsel has cited the Osceola case, which I think was a case from the Eastern District of Virginia.

On a motion for a judgment of non-suit against the plaintiff all the facts in the record must be interpreted in the [fol. 44] most favorable light to the plaintiff, and I have undertaken to do that. It is my view that the plaintiff on his own statement as set out in the record, not only on direct, but on cross examination, failed to establish a case of negligence which would justify the submission of that issue to the jury.

My recollection of what this gentleman (the plaintiff) said is that the wrench was an old one and had been used for a long time there, and that there was nothing wrong with the wrench except that it had become worn about one-sixteenth of an inch in the bite, that is, the opening which fits around the nut that is supposed to be tightened or loosened as the case may be. That it was not an S-wrench but a straight one. And his testimony was illustrated by a new wrench recently purchased to exhibit to the jury. That he was thoroughly familiar with the wrench and its proper use. He stated that for three or four weeks, he had used it on several occasions each week. That he had told his immediate superior that they needed a new wrench, that this one was worn, and his superior told him he would send in a requisition for a new wrench. He stated there was a

tool-chest belonging to the chief engineer, I think—certainly there was one on the boat,—in which there were other wrenches, and that he was at liberty to use them if he saw fit; he was not excluded from the use of them. And I think he described the kind of wrenches. I think he said there was a monkey-wrench among them. He described the platform and what he was doing at the time he was hurt.

On cross examination of the plaintiff by defendant's counsel, a stronger case was made against the plaintiff than on direct examination of the plaintiff. It is the plaintiff's testimony alone that I am considering here. He himself used the device—the wrench. It may be that the accident occurred by reason of the wrench being worn, or it may be that it did not occur from any such reason. He [fol. 45] might not have carefully manipulated it. The burden was on him to show how and why the injury occurred and that the alleged negligence was the proximate cause of the injury which he sustained. Counsel said, "Oh, yes, if he had another wrench, this might not have happened." Precisely! That reminds me of the story of a stranger who asked a local man: "Which is the best hotel in this town?" And the man said: "Well, there are two, if you go to one you will wish you had gone to the other." The illustration of counsel about the other kind of a wrench, was insidious and ingenious. I was interested in his presentation of his motion this morning, which was intelligent and it may be to the point. But I think not. But even in using the wrench he described, it would be possible for that to slip also. It depends on whether the operator properly adjusts it. We cannot go into the realm of speculation about these things.

My recollection is fairly clear on this simple tool doctrine by reason of the fact that I tried a case in the Fourth Circuit: Newbern v. Great Atlantic & Pacific Tea Company some time ago.

I ask your indulgence to tell you why I have made this decision, and also to give the Circuit Court the benefit of the reasons that prompted me to make the ruling.

The simple tool or appliance doctrine is concisely stated in Newbern v. Great Atlantic & Pacific Tea Co., 68 F. (2d) 523, and I quote—the Court said in the Newbern case:

"It is well settled that, while it is the duty of the master, in exercise of reasonable care for the safety of the employee, to see that machinery and appliances which may

cause injury to him are in reasonably safe condition, this duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be appre-
[fol. 46] hended or as to which the employee is in a better position than the master to discover defects."

Some statement was made by counsel while illustrating a cable that broke, that the duty devolved on the defendant to furnish absolutely safe equipment. I do not understand that to be the law. It is the duty of the master to exercise reasonable diligence and care, to provide reasonably safe tools and appliances. The master does not guarantee. The duty does not ordinarily exist with respect to simple tools from the use of which no danger is to be reasonably apprehended and as to which the employee is in a better position than the master to discover defects. Numerous authorities were cited by the Circuit Court of the Fourth Circuit in the Newbern case.

In that case the facts were in substance as follows: The plaintiff alleged that he was not furnished with a safe place in which to work and with safe and suitable appliances, in that a floor scale was defective, unsafe and dangerous. In particular, it was alleged that the wheels were old, broken and in a dangerous and unsafe condition and not sufficient and adequate to enable the scale to be safely moved by the defendant's employees,—rolled from one place to another or from one platform to another. The plaintiff was injured when one of the wheels came off causing the right side of the scale to drop and the left to rise. The right side went down on his foot and crushed it to some considerable extent. He was seriously injured, not permanently however.

The Court, at page 525, said:

"The rule that the master is not ordinarily liable for defects in simple tools is based upon the idea that ordinarily the employee has better opportunity than the master to observe such defects and guard himself against them, and
[fol. 47] that the master should not be charged with the duty to care for the safety of an employee with respect to a matter as to which the employee is in a better position to care for himself."

And then the Court cites Vanderpool v. Partridge in 13 L. R. A.:

"But it is also to be observed that the non-liability of the master for defects in simple tools is based upon the

fact that ordinarily, as in the case at bar, no danger to the employee is to be apprehended from defects therein which he cannot easily guard himself against. Ordinarily, they are reasonably safe for the use for which they are intended; and the duty of the master is not to furnish tools free of defects, but tools that are reasonably safe."

That is the rule.

In 13 L. R. A. (N. S.), at page 688, a law treatise of great standing and force and acceptability to the highest courts in the land, I find the following:

"The rule of respondeat superior rests upon the assumption that the employer has a better and more comprehensive knowledge than the employee, and therefore ceases to be applicable where the employee's means of knowledge of the danger to be incurred is equal to that of the employer. Such is the case where the instrument or tool, the defect in which is the cause of the injury is of so simple a character that a person accustomed to its use cannot fail to appreciate the risks incident thereto."

The evidence here by the plaintiff is that he had used the wrench for weeks and weeks, not constantly, but at dif- [fol. 48] ferent intervals, when he changed those oil screens and that he was perfectly familiar with it and its defects.

In the same note the following instrumentalities, among others, are referred to as having been held to be simple tools: a fork used in a dye-house. That is a fork to stir up the garments. A hook with a short handle used in moving timber in a saw mill. I happen to know what is referred to, an ordinary cant-hook used to roll a log over, made of a hook of iron and a wooden shank or shaft.

In Labatt's Master and Servant, 2nd Edition, Section 924 (a), in discussing the simple tool rule, it is said:

"In some cases the courts have gone to the length of stating that the rule requiring the master to use ordinary care to furnish reasonably safe appliances does not apply where the injury was caused by a simple tool."

I again stress that the duty is not on the defendant in this case or in any case of like character to guarantee that the tools furnished are free from defects. Only reasonable care and diligence is required to ascertain whether the tools are reasonably safe.

In support of that statement I might cite the case of Smith v. Green Fuel Economizer Co., 123 App. Div. 672, where a fatal accident resulted from the use of a certain ladder alleged to have been defective, which tipped sidewise, and the user fell and was injured. The Court, in holding the complaint should have been dismissed, said:

"Moreover, the deceased had been in the habit of using the ladder and was as competent as anyone else to say it was safe."

Here the plaintiff had been in the habit of using the wrench and knew more about it than his superiors according [fol. 49] ing to his own testimony. None knew anything about the wrench except the superintendent who said he would order another.

Taken in the strongest view, the defendant did all that was necessary; when the plaintiff told him the wrench was defective, he had a new one ordered immediately. The injury occurred before the new wrench was supplied. If the defendant had failed to furnish a new wrench within a reasonable time that would present a different question. The defendant was entitled to reasonable time in which to supply a new wrench.

"The rule of employer's liability applicable to complicated and dangerous machinery does not apply to simple things like ladders."

What could be more simple than this wrench? You all saw what sort of a tool it was. It was just like the one plaintiff hurt himself with. This was not worn, and the old one was—that is the only difference.

The plaintiff sues in this case under the Jones Act, which adopts the Federal Employers' Liability Act to seamen's actions. The simple tool and appliance doctrine was applied to a railroad worker in the case of Spain v. Powell, 90 F. (2d) in the Fourth Circuit. There the plaintiff alleged that his employer was negligent in failing to furnish him with proper appliances for his work. The injury resulted from a chain giving way, causing a part for a railroad car to fall on the plaintiff's hand. The Court, after quoting from the Newbern case, said, with respect to the relation of the simple tool doctrine to the question of assumption of risk:

"This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possi-

[fol. 50] bility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects of such tools, that no inspection is necessary to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery. With respect to simple tools, ordinarily the master is not relieved of responsibility because the servant assumes the risk, but the servant assumes the risk, because the master is relieved of responsibility, or, what is probably a more accurate statement, the same circumstances which establish assumption of risk on the part of the servant show that there is no duty on the part of the master. Assumption of risk by the servant does not necessarily imply negligence on the part of the master."

In the case of Kilday v. Jahncke Dry Dock & Ship Repair Co., Inc., 281 Fed. 133, in the Fifth Circuit, the plaintiff was injured when a piece of the cutting edge of a chisel which he was using broke off and struck him in the eye. The negligence charged was failure to test the chisel. A chisel and a wrench—who can distinguish between the simplicity of the two tools? There is no distinction as to simplicity. The negligence charged was failure to test the chisel by the master to see whether it was a good chisel, free from defect. In affirming a decree sustaining an exception to the libel, the Circuit Court said:

"The general rule that it is the duty of the master to supply the servant with safe tools and appliances is sub-[fol. 51] ject to a well established exception in case of common and simple tools and appliances. Upon the theory and for the reason that the servant has a good opportunity for ascertaining the defects in simple tools, such as a chisel, as the master has, the law relieves the master of the duty which it imposes upon him where he furnishes complicated tools or machinery for the use of his servant."

In Middleton v. National Box Co., 38 F. (2d) 89, a comparatively recent case, the plaintiff was injured when a chisel, fashioned from an old file, broke. A chisel was

made from an old file and it broke. Commenting that the case was controlled by the general law of negligence, as to which the Federal and Mississippi decisions are in harmony, the Court said:

"They hold that in the case of simple tools the master, as a matter of law, is relieved of the ordinary duty of furnishing safe tools and appliances to the servant, and of inspecting and repairing the same furnished.

"* * * In fact, as a matter of law, the employee's knowledge of simple tools is presumed to be equal to that of the master."

Now, ladies and gentlemen, it is with considerable reluctance that I grant the defendant's motion for a judgment as of non-suit in this case. The reluctance is not born of the thought that I would do something wrong if I granted the motion or something wrong if I did not. The reluctance I find troubling me is due to the fact of the practical set-up or situation of this case. There is not very much involved in it at most, and it will be a great burden on this plaintiff to take this case to the Circuit Court, particularly on plaintiff's counsel, and on account of the [fol. 52] fact that there is not much involved, even if there is a final victory for the plaintiff, I dislike to place that burden on him. If I had my preference I would place the burden of review on the City of New York on the theory that it is amply able to take the case to the Circuit Court if it desired to or to the United States Supreme Court if it desired to. But I cannot be controlled by that consideration. I have to decide what I think is the law of this case based on the facts. If I did otherwise I would be in the same position if you got the case and determined it on account of sympathy or returned a verdict for the City because you live here.

We are not supposed to try cases on any such theory. A case is not properly tried unless fairly tried by all connected with it whose duty it is to see that it is fairly tried, the attorneys for the respective parties, the Judge and the jury.

I do not take any pride in my opinion. It is immaterial to me whether the Circuit Court affirms or reverses. I have no reason in the world to prompt me to grant the defendant's motion except that I think the plaintiff has failed to make out a case. If I followed my personal pref-

erences I would deny the motion and let the jury say whether the plaintiff was injured through the negligence of the defendant. But I cannot do that.

I was impressed by counsel's argument this morning. It was a good argument and plausible and persuasive, but after hearing it with an unbiased mind, I am satisfied that the plaintiff failed to make out a case against the defendant, prima facie, of negligence, and having failed in that it is the duty of the Court to hue to the line and let the chips fall where they may.

For the reasons stated, and in accordance with the law as I understand it, I am of the opinion that my judgment of non-suit should stand. To all of which the plaintiff has an exception.

[fol. 53] IN THE UNITED STATES DISTRICT COURT

STIPULATION AS TO CASE AND EXCEPTIONS—Nov. 30, 1940

It is hereby stipulated and agreed that the foregoing case and exceptions is hereby settled and allowed and the same may be signed and ordered on file and made part of the record on appeal in this cause.

Dated, New York, November 30, 1940.

Silas B. Axtell, Attorney for Plaintiff. William C. Chanler, Corporation Counsel, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER AS TO CASE AND EXCEPTIONS

The foregoing case and exceptions embodied herein from page 12 to page 52, inclusive, is hereby settled and allowed and ordered on file and may be entered and made a part of the record on appeal in this cause.

Isaac M. Meekins, U. S. D. J.

[fol. 54] IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

SIR:

Please take notice that the plaintiff, William Jacob hereby appeals to the United States Circuit Court of Appeals for

the Second Circuit from the judgment entered herein on April 5, 1940, dismissing the complaint on the merits and awarding costs in favor of the defendant and against the plaintiff.

Yours, etc., Silas B. Axtell, Attorney for Plaintiff, Office & P. O. Address, 15 Moore Street, New York City.

To: William C. Chanler, Esq., Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, New York City.

[fol. 55] In the United States District Court

Stipulation As to Exhibits—Nov. 30, 1940

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that none of the exhibits need be printed or placed in the record on appeal, but may be handed up to the Appellate Court at the argument of the appeal, by either party, with the same force and effect as though the same had been fully printed and placed in the record.

Dated, New York, November 30, 1940.

Silas B. Axtell, Attorney for Plaintiff. William C. Chanler, Corporation Counsel, Attorney for Defendant.

[fol. 56] In the United States District Court

Stipulation Settling Record—Nov. 30, 1940

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action.

Dated, New York, November 30, 1940.

Silas B. Axtell, Attorney for Plaintiff. William C. Chanler, Corporation Counsel, Attorney for Defendant.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

OPINION—May 5, 1941

Appeal from the District Court of the United States for the Southern District of New York

This is an action under the Jones Act, 46 U. S. C. A. § 688, brought by a seaman to recover damages for personal injuries, with an additional count for maintenance and cure. The complaint was dismissed on the merits at the close of the plaintiff's case. From the resulting judgment for the defendant, he has appealed. Reversed in part.

Before L. Hand, Swan and Augustus N. Hand, *Circuit Judges*

[fol. 59] Silas B. Axtell, Attorney for appellant; Dominick Blasi, of counsel.

William C. Chanler, Corporation Counsel, Attorney for appellee: Paxton Blair, Alfred T. White and Leon Shaw, of counsel.

Per Curiam:

The first cause of action was dismissed on the defendant's motion at the close of the plaintiffs' case upon the ground that he had failed to prove facts sufficient to justify submitting to the jury the issue of the defendant's negligence. The plaintiff's story of the accident was briefly as follows: For many years he had been in the employ of the city as a water tender on its ferryboats. While working in the boiler room of the "Dongan Hills" on October 4, 1938 he was using an ordinary S shaped open end wrench to tighten a nut on the manifold head; as he put strain upon it the wrench slipped, causing him to lose his balance and fall from a platform, eighteen inches square, upon which he was obliged to stand to do the work. He ascribed the slipping of the wrench to the fact that its jaws had become worn by use so that it did not fit the nut perfectly but had a play of about one-sixteenth of an inch. He had used the same wrench on previous occasions. Two days before the

accident he had complained to the chief engineer about it and asked for a new one. The chief told him to look in the tool closet, and, when he found none there which would fit the stud, the chief sent out an order for a new one; but it had not arrived on the date of the accident. The plaintiff admitted, however, that there were monkey wrenches on board the ferryboat and that he could have used a monkey wrench for the work in hand.

[fol. 60] Having elected to sue under the Jones Act, 46 U. S. C. A. §688, the plaintiff was obliged to establish that his injuries were caused by the defendant's negligence. *Kumschman* v. *United States*, 54 F. 2d 987, 989 (C. C. A. 2). In taking the first cause of action from the jury the trial judge relied on what is sometimes called the "simple tool doctrine". See *Newbern* v. *Great Atlantic & Pac. Tea Co.*, 68 F. 2d 523 (C. C. A. 4). This so-called doctrine is but a short hand method of saying that the employer's duty to use reasonable care for the safety of his workmen does not require him to test or inspect ordinary simple tools from the use of which no danger is reasonably to be expected and as to which the employee is in a better position than the master to discover defects resulting from wear and tear and to protect himself against the risk of using the tool, if defective. In other words, the probability of any danger against which the employee cannot reasonably be expected to guard himself is so remote as to relieve the master of the duty of inspecting such simple tools or of warning his employee against the use of them if they show signs of wear. *McMillan* v. *Mineto Shade Cloth Co.*, 134 App. Div. 28, 31; *Miller* v. *Erie R. R. Co.*, 21 App. Div. 45, 47. The master's freedom from liability is not because the employee has been negligent or has knowingly assumed the risk—both contributory negligence and assumption of risk being excluded as defenses under the Jones Act—but because the master has been guilty of no negligence with respect to the tool used by the employee. *Newbern* v. *Great Atlantic & Pac. Tea Co.*, 68 F. 2d 523 (C. C. A. 4); *Middleton* v. *National Box Co.*, 38 F. 2d 89, 91 (S. D. Miss.); *Allen Gravel Co.* v. *Yarbrough*, 133 Miss. 652; 98 So. 117; *Hedlicke* v. *Highland Springs Co.*, 185 Minn. 79, 239 N. W. 896; see 91 A. L. R. 786. In the case at bar, the plaintiff was at liberty to select such tools as he thought suitable for the work in hand; he was not acting under orders in [fol. 61] using the worn wrench; if the wrench was in such

condition that he thought its use dangerous, he was under no necessity of using it, for a monkey wrench, admittedly suitable, was at hand. Under these circumstances the master had no reason to suppose that the plaintiff would use a wrench so worn as to create a situation of danger. Consequently we think the trial judge was right in not leaving to the jury the issue of negligence. The first cause of action was properly dismissed.

On the second cause of action, maintenance and cure, the defendant offered to consent to a judgment for loss of wages from the date of the accident until the plaintiff's return to work on November 10, 1938. No other damages were proven under this count, as the plaintiff had received free hospitalization. His counsel, however, refused "to accept any such judgment", and thereupon the second count was likewise ordered dismissed. In so doing we think the court erred. Counsel's irritable refusal to take any judgment if the first count were withdrawn from the jury does not justify penalizing his client by forfeiting an admitted liability for maintenance. An attorney cannot, without special authority from his client, release a cause of action except on full payment or otherwise surrender his rights. *Glover* v. *Bradley*, 233 F. 721, 726 (C. C. A. 4); *McFarland* v. *Curtin*, 233 F. 728, 730 (C. C. A. 4); *Martin* v. *Lehigh Valley R. R.*, 114 N. J. L. 243, 176 A. 665, 667; *Hahn* v. *Loker*, 229 Mass. 363, 118 N. E. 661, L. R. A. 1918 D. 807. Nor is an unauthorized settlement binding on the client. *Schneider* v. *Abrams*, 228 App. Div. (N. Y.) 1; *Countryman* v. *Breen*, 241 App. Div. 392, 394. From this we think it follows that the refusal here to accept a judgment to which the client was entitled should be given no effect. Although this point has not been urged upon appeal, the court will take it *sua sponte* in favor of a seaman who is often treated as in a sense a ward of the admiralty [fols. 62-70] court. Judgment should have been directed for the amount admitted to be due from the defendant, namely $214.37.

Accordingly dismissal of the first count is affirmed but dismissal of the second count is reversed with directions to enter judgment thereon in favor of the plaintiff in the sum admitted to be due.

Petition for rehearing covering 8 pages filed May 19, 1941, omitted from this print. It was denied, and nothing more by order of May 21, 1941.

[fol. 71] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 21, 1941

Before L. Hand, Swan and Augustus N. Hand, Circuit Judges

Silas B. Axtel for the appellant.

Per CURIAM:

Petition for rehearing denied.

L. H., T. W. S., A. N. H., C. JJ.

[fol. 72] IN UNITED CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed May 21, 1941

A petition for a rehearing having been filed herein by counsel for the appellant, upon consideration thereof, it is Ordered that said petition be and hereby is denied.

D. E. Roberts, Clerk.

[fol. 73] [File endorsement omitted.]

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS

WILLIAM JACOB, Plaintiff-Appellant,

v.

THE CITY OF NEW YORK, Defendant-Appellee

JUDGMENT—Filed June 10, 1941

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the

Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court on the first count is affirmed, and judgment on the second count is reversed with costs and with directions to enter judgment thereon in favor of the plaintiff in the sum admitted to be due.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 75] [File endorsement omitted.]

[fol. 76] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Motion to Recall and Amend Mandate—Filed July 21, 1941

A motion having been made herein by counsel for the appellee to recall and amend the mandate heretofore issued in the above entitled case, so as to provide that costs on appeal be awarded to the defendant-appellee as the prevailing party;

Upon consideration thereof it is Ordered that said motion be and hereby is granted.

D. E. Roberts, Clerk.

[fol. 77] [File endorsement omitted.]

[fol. 78] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] Supreme Court of the United States

Order Allowing Certiorari—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover. Enter Silas B. Axtell. Seamen's Case. File No. 45,917. U. S. Circuit Court of Appeals, Second Circuit. Term No. 589. William Jacob, Petitioner, vs. The City of New York. Petition for a writ of certiorari and exhibit thereto. Filed September 6, 1941. Term No. 589, O. T. 1941.

(7828)

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 589

WILLIAM JACOB,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SILAS B. AXTELL,
DOMINICK BLASI,
Counsel for Petitioner.

ACKERMAN PRESS, Inc., 303 East 44th St., 'Phone VAnderbilt 6-1898

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Supreme Court of the United States

OCTOBER TERM, 1941.

WILLIAM JACOB,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, William Jacob, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed, in the manner hereinafter set forth, a judgment of dismissal, of the District Court for the Southern District of New York. The Circuit Court of Appeals affirmed the dismissal of the main count set forth in the complaint, which was a cause of action for damages resulting from severe personal injuries suffered on board ship. The second and minor count, a cause of action for maintenance and cure, was reversed. This petition is for a review of that part of the judgment that was affirmed.

Statement as to Jurisdiction.

The decree of the Circuit Court of Appeals was entered on the 10th day of June, 1941 (R., 74). The Court's jurisdiction to entertain and grant this petition is provided by Sec. 240 a of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347 [a]).

Decisions Below.

Petitioner's action was brought under Sec. 33 of the Merchant Marine Act of 1920, Title 46, United States Code Annotated, Sec. 688 (commonly known as the Jones Act), which incorporated by reference the Railroad Employers' Liability Act, Title 45, United States Code Annotated, Secs. 51 to 59, to recover damages for personal injuries (first count), and maintenance and cure (second count). The petitioner was injured in the course of his work on respondent's ferryboat "Dongan Hills".

The case was tried in the District Court before the Honorable Isaac M. Meekins, District Judge, and a jury (petitioner having elected to proceed at law under the said Jones Act and demanded a jury trial pursuant to Rule 38 of the Rules of Civil Procedure for the District Courts of the United States), on February 29, 1940 and March 1, 1940. The Court upon petitioner resting his case entertained a motion to dismiss the complaint. The motion was granted and the complaint dismissed (R., 39 and 52). Exceptions in both instances were allowed (R., 39 and 52).

The trial Court did not hear nor did the respondent present any proof or evidence (R., 39 and 52). The trial Court disposed of the issues on the merits and the Circuit Court of Appeals rendered its decision as aforesaid on petitioner's evidence alone.

The District Court refused to have the jury pass upon the facts and to determine them, but ruled on them itself, as a matter of law (R., 39, 52).

The Circuit Court of Appeals rendered a per curiam opinion, 119 Fed. (2) 800. The Circuit Court sustained the District Court on the first count, i. e., the count for the damages for the personal injuries and reversed the count for maintenance and cure, with a direction that judgment on the latter count be entered for the amount offered by respondent in the District Court.

The entire matter was disposed of, and the Circuit Court found the facts against petitioner, holding as did the trial Court, that Jacob as a matter of law, could not have a recovery.

The Circuit Court in announcing and applying to the facts so found made a ruling as to the law, which, it is submitted was erroneous. Petitioner seeks a review of that ruling.

Questions Presented.

Stated in broad terms, the questions are:

First—Whether a shipowner may have the benefit of the so-called "simple tool doctrine", heretofore unknown to the law of the sea, and the shipowner thus relieved of liability for personal injuries suffered by a seaman injured in the course of his employment while using a worn and only appliance available, where the shipowner has failed to provide a safe and proper appliance.

Second—Contrary to the evidence the Court below stated that petitioner had available for use, a proper appliance. Assuming that be so, the further question is whether the rule of comparative negligence, rather than that of assumption of risk applies to the seaman who has made use of a defective appliance, where a safe one is available.

Socony-Vacuum v. *Smith*, 305 U. S. 424.

With specific reference to the facts involved here, the question is as follows:

Are not shipowners required to exercise a high degree of care to provide sufficient and proper appliances for use of seamen in the proper performance of their work pursuant to the Maritime Law, the Jones Act and the Railways Servants' Act (supra)? May a trial Court in a case triable by jury, deprive the seaman of his right to have the jury pass judgment on the facts, he having elected to sue at law under the Jones Act, or may the Court exercise the function of the jury to determine the issues?

The Circuit Court of Appeals has applied, as has the District Court, a rule known as the "simple tool doctrine" to a seaman's case brought under the Jones Act. It appears, and so far as known no case has been presented to this Court involving a seaman's action in which the said "simple tool doctrine" has been applied to a seaman's case under the Jones Act. The said doctrine has to petitioner's knowledge heretofore been applied exclusively to torts on land, not to cases of seamen on ships.

The questions here presented have not been answered by this Court.

It will be shown that the Circuit Court dealt with the present case as though it had the same power as Congress over the Jones Act. It incorporated into the Maritime Law a doctrine unknown to seamen, ships and shipowners.

Petitioner also brings up for review the reversible error of the trial Court in excluding custom evidence. *Standard Oil Company of New Jersey* v. *DeVries*, 3 Fed. (2d) 852; *Malbrunn* v. *Hamburg-American S. S. Co.*, 77 Fed. (2d) 304.

The writ of certiorari should be granted because the judgment is patently contrary to the Federal Statutes and the applicable decisions of this Court to seamen's cases, and the questions involved are of substantial importance for the proper administration of justice. At the present time numerous cases throughout the country are in liti-

gation, in which seamen injured aboard vessels have brought suit to recover damages for injuries suffered by them while using worn tools and improper appliances.

Statement of Facts.

Jacob was employed as a water tender, on the City of New York's ferryboat, "Dongan Hills", and was injured on the 4th day of October, 1938, while in navigable water of the United States at the Port of New York. On the date in question, as set forth in the pleadings, Mr. Jacob was changing oil strainers, when suddenly the wrench that he was using slipped, and petitioner was caused to be precipitated from and fall off a platform, striking and landing on a catwalk or grating, whereby he sustained the injuries sued for (R., 14). The process of changing the oil strainers was by taking one strainer out and putting another one in—by the head of a manifold (R., 15), this manifold being a device that contains more than one strainer. To take the strainer off it is necessary to take off six bolts. The individual performing the service was required to stand on an 18" square, stationary platform (R., 16).

The manner of the happening of the accident is briefly thus:

> "Q. What happened? A. In taking off these bolts and putting them on they have to be very tight, and I put a strain on them and the wrench slipped and I had nothing to grab and I fell and hit an angle iron" (R., 16, 17).

The wrench which was being used "was well worn." "It had seen a lot of service. It had a lot of play on it" (R., 17).

In inquiring about the wrench, the trial Court was given the following testimony (p. 18):

"The Court: Was there anything wrong with the wrench except at the end?

The Witness: It was very loose.

The Court: A loose fit?

The Witness: Yes, sir.

Q. Was there any other wrench on the boat that would fit the stud? A. Not that I know of.

Q. Did you make inquiries to get a better or another wrench? A. I did.

Q. From whom? A. The chief engineer.

Q. Did you show him the wrench you had been using? A. No. I told him the wrench I had was very bad.

Q. What did you tell him exactly? A. I told him I would like to have a new wrench.

Q. What did he say? A. He said for me to look in the tool closet and see if there was one in there; and I went up there and couldn't find any and I believe he said he sent an order out for me.

Q. How long before that, before the accident, did you report that? A. I guess two or three days before.

The Court: Had the wrench been slipping before that?

The Witness: Yes, she was.

Q. Where were the tools kept on this ship? A. In the engine room.

Q. Was there a place for them? A. There was a tool locker there.

Q. What do they call it? A. A tool locker.

. . . . . .

Q. It was just a place where tools were supposed to be put when not in use? A. Yes, sir.

Q. You looked over all they had there? A. I did.

Q. You found no end wrench? A. That is right."

This is additional testimony as to the defectiveness of the wrench (R., 22):

"Q. I want you to take this open end wrench and just show the jury, using that to illustrate with, what you say was the matter with the other wrench? A. There was play in the jaws; it was worn.

Q. And what happened? A. It slipped.

Q. When it slipped what happened to you? A. I lost my balance and went off the platform and found myself in the passageway.

Q. What did you strike against? A. An angle iron."

The plaintiff was severely injured (R., 22), and has had constant pain of his whole side, with difficulty in breathing (R., 23). Several ribs were fractured (R., 10).

Petitioner on cross examination gave the following testimony:

"Q. On this day he (chief engineer) had a whole set of tools and wrenches, didn't he? A. No.

Q. Did you look in his tools? A. I did.

Q. And you didn't find any wrenches? A. Not one to fit" (R., 29).

Proof of general custom, usage and practice, with regard to the supply of tools, wrenches, etc., was offered but the Court refused to allow it (R., 36, 37).

On motion of the respondent that petitioner failed to offer proof and to introduce evidence sufficient to constitute a cause of action (fol. 114), a motion was granted with an exception to petitioner, the Court holding that under the "simple tool doctrine" plaintiff could not succeed (fol. 116), and its authority for the ruling was the case of *Newbern* v. *Great Atlantic & Pacific Tea Company*, 68 Fed. (2d) 523 (R., 39).

The Court did not find that the petitioner gave any false testimony, nor was there any such suggestion. It was accepted as true.

The testimony given by petitioner was not contradicted. He stated that the superintendent was told that he would order another wrench but it was never done. Jacob's superior officers knew the one in use to be worn and of improper design. What was needed and should have been provided was not done.

The Circuit Court in affirming the ruling of the District Court overruled petitioner who endeavored to show that the respondent should have supplied a better and different tool.

The trial Court erred (R., 37) in refusing to permit the plaintiff to prove the difference between the type of wrench he was using and a proper one (R., 37). The trial Court should have submitted to the jury under the circumstances the issue of whether the respondent had exercised that degree of care required of it by law to furnish the employee with reasonably safe tools and equipment and a proper place to work.

The Circuit Court and the trial Court have both erroneously applied the so-called "simple tool doctrine" to a maritime tort and the former has erred in ruling "that the master has been guilty of no negligence with respect to the tool used by the employee".

Reasons for Granting the Writ.

The Circuit Court has decided an important question of Federal Law, which has not been, but should be, settled by this Court.

The importance of the question lies in the following: That the Courts below have held that a seaman may not recover damages for personal injuries suffered while using a defective or worn tool or appliance, and the shipowner

has been relieved of the responsibility of furnishing proper and suitable tools to seamen although the Railway Servants' Act makes it mandatory that the master do so; and that where a seaman has been injured in the course of his work and evidence of custom and practice is submitted to prove the necessary tools or appliances required to be furnished to the employee, that such testimony should be excluded, and lastly that although suit is brought under the Jones Act, at law with a jury trial the Court may take the issues away from the jury and decide the case itself, as a matter of law.

Respectfully submitted,

WILLIAM JACOB,
By SILAS B. AXTELL,
Attorney of Record.

Dated, New York, August 30, 1941.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

SILAS B. AXTELL.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1941.

No. ____

WILLIAM JACOB, *Petitioner,*

against

THE CITY OF NEW YORK, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Reference has been made in the petition to the jurisdictional provisions and the proceedings and opinions below. The facts of the case are stated in the petition.

The general proposition for which the petitioner contends is that a shipowner should not be immune from liability for personal injuries suffered by a seaman in the course of his work due to a worn appliance, where the shipowner has failed to provide to the seaman a proper one; that assuming that a seaman has available for use other appliances from which he has selected a defective one, the rule of comparative negligence rather than that of assumption of risk should be applied to the seaman who is injured while making use of the defective appliance, assumption of risk and contributory negligence being excluded by the Jones Act.

The specific proposition for which the petitioner contends is that the "simple tool doctrine" heretofore applicable to land torts only, and unknown to the law of the sea is not applicable to seamen.

POINT I.

The "simple tool doctrine" is not applicable to seamen. It is a shipowner's duty to provide a seaman with a seaworthy vessel and with safe and proper appliances and tools. The Circuit Court erred in holding to the contrary.

The statute is not permissive but mandatory upon an employer to furnish proper tools and appliances (Sec. 51, Title 45, U. S. C. A., incorporated by reference in the Jones Act). It provides that every employer

> "* * * shall be liable in damages to any person suffering injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its * * * appliances, machinery * * * or other equipment."

A shipowner is obliged to provide its employees with a seaworthy vessel and with proper gear, appliances, equipment, devices and tools. The statute (Jones Act) applies to it as well as a carrier by rail.

> Sec. 688, Title 46, U. S. C. A. (Jones Act);
> Sec. 51, Title 46, U. S. C. A. (Railway Servants Act);
> *Panama* v. *Johnson*, 264 U. S. 375;
> *Pacific* v. *Peterson*, 278 U. S. 130;
> *Socony-Vacuum* v. *Smith*, 305 U. S. 424.

The evidence is clear and uncontradicted that the wrench was worn and defective (R., 18) and there was "not one to fit" available (R., 29).

Jacob being a seaman and entitled to the benefits of the Jones Act, should not have been deprived of his right to a jury trial. The Courts below should have applied the law applicable to this case, rather than a rule unknown or inapplicable to maritime torts.

In *The Seeandbee*, 102 Fed. (2d) 577, 1939 A. M. C. 711, the Court, at page 716 of the latter citation, ruled:

> "It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and this does not depend on the exercise of reasonable care, but is absolute. *H. A. Scandrett*, 2 Cir., 1937 A. M. C. 326, 87 F. (2d) 708."

In *Zinnel* v. *Fleet Corp.*, 10 Fed. (2d) 47, 48, a dismissal in a law action in which the shipowner was charged with failure to provide a rope for decedent's safety was reversed and it was held:

> "* * * All we need, and do, hold is that under the law of master and servant, as now in force by statute, the circumstances were such as would allow the jury to find that there was no rope, and that its absence, made the intestate's place of work unsafe."

Such was the situation herein. Respondent neglected to furnish Jacob with a suitable and proper wrench, as required. Petitioner's place of work was thereby rendered unsafe.

A shipowner warrants the seaworthiness of the vessel, and is obliged to provide the seaman with safe equipment, and this is implied in and is a part of the contract of employment. That has been, and still is the law of the sea. The Jones Act gave additional remedies and increased the seaman's rights and remedies under the settled maritime law.

Rainey v. *New York and Porto Rico Steamship Co.*, 216 Fed. 449;
Storgard v. *France*, 263 Fed. 545, certiorari denied 252 U. S. 704;
Cortes v. *Bull Line*, 287 U. S. 367;
Engel v. *Davenport*, 271 U. S. 33.

In the *Rainey* v. *New York and P. R. S. S. Co.* case (supra), the rule was enunciated as follows:

> "According to the general maritime law, there was an implied warranty on the part of the shipowner that the ship in question was seaworthy at the time of beginning the voyage in question" (p. 453).

It was satisfactorily established by petitioner that a safe and suitable wrench was not on the vessel for his use. The trial Court should have submitted the issues to the jury; and the Circuit Court should have reversed the dismissal.

Crickett v. *Parry*, 263 Fed. 523, certiorari denied 252 U. S. 580;
O'Shea v. *Shipping Board*, 5 Fed. (2d) 123;
Storgard v. *France*, 263 Fed. 455;
Grimberg v. *Admiral Oriental Line*, 300 Fed. 619;
Ives v. *United States*, 68 Fed. (2d) 201;
Zinnel v. *Fleet Corporation*, 10 Fed. (2d) 47;
Stevens v. *O'Brien Co.*, 62 Fed. (2d) 632.

The cause of Jacob's injuries was respondent's failure to supply and keep the vessel equipped with sufficient and proper tools, and it was for the jury to determine the issue of negligence, not the trial Court, petitioner having duly elected to sue under the Jones Act and demanded a jury trial.

This case is no different than the numerous cases that have been decided by the Courts in which a shipowner has been held liable for failure to provide a rope, ladder, door hook, socket wrench, etc. The doctrine of simple tool is applicable to cases where an employer furnishes a tool which is defective in its manufacture or construction, such

as an improperly tempered chisel which splinters or a bolt or a water glass that breaks because of inherent defect. In such cases the courts hold and rightfully so that the employer, having made every reasonable effort to provide proper appliances, cannot be held liable for the inherent or latent defect of the instrument purchased from a reputable manufacturer, but cases are lacking in which the simple tool doctrine has been held to apply to instruments which have become worn out and no longer fit for use or which was not the correct design or kind, which should be removed from the vessel and replaced with new or better ones. The worn out wrench should have been replaced with a new, better or suitable one. Respondent had ample time to do so—"two or three days" (R., 29). The petitioner does not, and did not below, contend that the instrument furnished him was inherently defective or improperly manufactured. He contends it was worn and unfit for use. There was no chipping or breaking. The slipping was due to its age, wear and tear, and because it was the wrong kind of wrench for that purpose. The case would be no different were the petitioner to have furnished any other instrument resembling a wrench, but unfit for the purposes intended in the performance of Jacob's duties. Furthermore, Jacob had no choice of selecting a good wrench from a bad one, there having been no others available (R., 29, 33), and the rule requiring shipowners to furnish proper tools should not be relaxed. The employer should be held to the requirements to exercise due care to furnish the necessary and safe tools.

In the case of *Coast Steamship* v. *Brady*, 1925 A. M. C. 1243, cert. denied 269 U. S. 578, it appears that a seaman was allowed a recovery by reason of the defendant's failure to provide a proper wrench. The Circuit Court of Appeals for the Fifth Circuit affirmed the award because, as it observed, at page 1245:

"Witnesses for the plaintiff and defendants agree that the ordinary barrel or socket wrenches are the kind which were suitable for the work being done on the occasion of plaintiff's injury, and that there were none on board of the necessary size."

And as further stated by it, at page 1247:

"It has been held by the Supreme Court that the Merchant Marine Act is constitutional, and that the Employers' Liability Act which renders carriers by railroad liable to employees for injuries resulting by reason of *any defect or insufficiency in equipment, including appliances, was made applicable to steamships* by the Merchant Marine Act as amended. *The Alliance, Panama Railroad Co.* v. *Johnson*, 1924 A. M. C. 55, 264 U. S. 375." (Italics ours.)

In *Howarth v. Shipping Board*, 24 Fed. (2d) 374, the facts were briefly, that a door hook was broken off and a fire brick was used in its place to hold the door from which the said hook had been broken off. In reversing the judgment of dismissal and ordering the case back for a new trial, it was held (p. 376):

"It is argued that the fire brick was a safe door stop, and had worked well enough before; but a different inference may be drawn; and a jury ought to have been allowed to say whether the defendant should have maintained a hook on the door to hold it securely back, or whether the brick provided in place of the missing hook was a reasonably safe appliance, in view of the tendency of ships to pitch and roll in rough weather. The dismissal of the cause of action to recover indemnity was error. If the door without the hook was unsafe, the *acts of defendants in furnishing*

an unsafe appliance would be negligent. The Merchant Marine Act of 1920 allows recovery for negligence. 41 U. S. Stat. at Large, page 1007 (46 U. S. C. A., Sec. 688 [Comp. St., Sec. 8337a])." (Italics ours.)

In the case of *Ives* v. *United States*, 58 Fed. (2d), 201, a decree of dismissal in admiralty was reversed and a recovery allowed. Ives was engaged as a fireman on a voyage between New York and Norfolk. One of the ventilators could not be turned, and a pipe was being used in an effort to do so; it slipped off the handle, sprang back due to the fact that torsion had been exerted on the reach rod, striking appellant's eye. The Court held that:

> "With a reach rod as long as this, it should have been foreseen by the appellant's superior that the use of the pipe as described would cause a spring and incur the danger of a torsion of the rod. The leverage with the push and pull thereon would cause it. *The non-delegable duty to use due and reasonable care to make and keep the ship seaworthy, as well as her appliances, was upon the owners during the voyage.*" (Italics ours.)

In the case of *Storgard* v. *France* (supra) Judge Ward, speaking for a unanimous bench in reversing the judgment obtained by the defendant in the trial Court, stated the issue was:

> "The charge of negligence was that the owner permitted the bolt to become worn and defective, so that the vessel was unseaworthy as to him. It will not be necessary to go into particulars, because the jury found a verdict for the defendant, and the only question to be decided is whether the court erred in charging them" (p. 546).

And held (p. 547):

> "If the bolt was worn and defective, and the shipowners knew or ought to have known the fact, it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen. The evidence was that the sailors always used this ring on their way to the topmast. The seamen were bound to use the equipment and appliances which the owners furnished, and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use, at least free from defects known or which ought to be known."

In *Helmke* v. *United States*, 8 Fed. Supp. 521, Judge Borah in an admiralty action awarded a seaman damages by reason of the shipowner's neglect in failing to maintain a chain railing reasonably safe. A dog ran between the seaman's legs and threw him off balance, and Helmke in an effort to steady himself grabbed the railing which gave way beneath his weight. In making the award, the trial Court followed the well known rule that:

> "The *respondent was obligated to provide reasonably safe equipment* for the libelant and I think it was a breach of that duty to him to fail to keep this chain railing reasonably safe for him and his fellow employees. When either through fault of the dog or otherwise the libelant lost his balance and involuntarily stumbled in the direction of and against the chain railing, he would have been uninjured except for the negligence in failing to keep the chain railing safe. There was no reason to suspect danger in allowing the dog on board ship or even in playing with him, and it was the natural and probable consequence of the negligent and wrongful failure to maintain a safe chain

railing, that ought to have been foreseen in the light of the attending circumstances, that was the proximate cause of the injury" (p. 522).

In the recent case of *McCarthy* v. *Palmer*, 113 Fed. (2d) 721, in which the defense of the simple tool doctrine was urged. The facts were briefly: A brakeman was injured while attempting to alight from a caboose when he slipped on a worn burlap rag nailed to the platform for a mat. The caboose was held to be defective, and the simple tool doctrine was not allowed. In rendering its opinion the Appellate Court held:

> "The appellants contend that they are not guilty of any actionable negligence because of the condition of the bag tacked to the platform, on the theory that the so-called simple tool doctrine, exemplified by such decisions as Newbern v. Great Atlantic & Pacific Tea Company, 4 Cir., 68 F. 2d 523, 91 A. L. R. 781, controls. That, however, fails to give adequate effect to the fact that the caboose was one of the cars the appellants were operating and that *its platform was defective because of the presence of the mat in its worn condition. That made the caboose a defective car.* It is true that the removal of the torn bag would have done away with the defect and that that would have been a simple thing to do but the ease with which the car would have been put into suitable condition for use does not alter the fact that it was actually defective due to the negligence of appellants or the fact that such negligence was the proximate cause of the plaintiff's injuries. If it does anything, it emphasizes that negligence." (Italics ours.)

POINT II.

The Circuit Court committed error in failing to follow and abide by the ruling of this Court in Socony-Vacuum v. Smith, 305 U. S. 424.

The Circuit Court stated that petitioner had a choice of tools. It should have under the circumstances reversed the dismissal and ruled as did this Court in *Socony-Vacuum Oil Company, Inc.* v. *Herbert A. Smith, Jr.* (supra), wherein the rule was definitely and clearly enunciated to be:

> "We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury".

POINT III.

Error was also committed in excluding custom evidence.

The Court having decided that the doctrine of simple tool applied, it excluded custom evidence. This was error. It is well settled that a plaintiff should not be prevented from so doing.

Maibrunn v. *Hamburg American Line*, 77 Fed. (2d) 304;

Standard Oil Co. v. *De Vries*, 3 Fed. (2d) 852.

CONCLUSION.

The Circuit Court and the trial Court in ruling as they did in effect overruled this Court in the rendition of its decisions, and we sincerely believe that the Courts below have decided a question of law in conflict with settled principles of maritime law applicable to seamen, and in holding and applying the "simple tool doctrine" to seamen have committed serious error necessitating a review by this Court, and review by certiorari should, therefore, be allowed.

Respectfully submitted,

SILAS B. AXTELL,
DOMINICK BLASI,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 589.

WILLIAM JACOB,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

SILAS B. AXTELL,
Attorney for Petitioner.

DOMINICK BLASI,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 589.

WILLIAM JACOB,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

Statement.

This case comes before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review that part of the decree which affirmed a judgment of dismissal of the District Court for the Southern District of New York. The petition for the writ of

certiorari was filed September 6, 1941, and certiorari was granted by this Court on October 13, 1941.

The dismissal and affirmance of the main count set forth in the complaint was a cause of action for damages resulting from personal injuries suffered by a seaman on board a ship, during the course of his work. The second and minor count, a cause of action for maintenance and cure, was reversed.

No written opinion was filed in the District Court. The colloquy on the motion to dismiss, remarks to the jury, and rulings appear at pages 31 to 42 of the record.

The per curiam opinion of the Circuit Court of Appeals, 118 Fed. (2) 800, appears in the record at pages 44 to 46.

The jurisdiction of this Court rests on Section 240 a of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347 [a]).

Facts.

Jacob was employed as a water tender, on the City of New York's ferryboat, "Dongan Hills", and was injured on the 4th day of October, 1938, while in navigable water of the United States at the Port of New York. On the date in question, as set forth in the pleadings, Mr. Jacob was changing oil strainers, when suddenly the wrench that he was using slipped, and petitioner was caused to be precipitated from and fall off a platform, striking and landing on a catwalk or grating, whereby he sustained the injuries sued for (R., 9). The process of changing the oil strainers was by taking one strainer out and putting another one in—by the head of a manifold (R., 11), this manifold being a device that contains more than one strainer. To take the strainer off it is necessary to take off six bolts. The individual performing the service was required to stand on an 18" square, stationary platform (R., 11).

The manner of the happening of the accident is briefly thus:

> "Q. What happened? A. In taking off these bolts and putting them on they have to be very tight, and I put a strain on them and the wrench slipped and I had nothing to grab and I fell and hit an angle iron" (R., 12).

The wrench which was being used "was well worn." "It had seen a lot of service. It had a lot of play on it" (R., 12).

In inquiring about the wrench, the trial Court was given the following testimony (R., 13-14-15):

> "The Court: Was there anything wrong with the wrench except at the end?
> The Witness: It was very loose.
> The Court: A loose fit?
> The Witness: Yes, sir.
>
> Q. Was there any other wrench on the boat that would fit the stud? A. Not that I know of.
> Q. Did you make inquiries to get a better or another wrench? A. I did.
> Q. From whom? A. The chief engineer.
> Q. Did you show him the wrench you had been using? A. No. I told him the wrench I had was very bad.
> Q. What did you tell him exactly? A. I told him I would like to have a new wrench.
> Q. What did he say? A. He said for me to look in the tool closet and see if there was one in there; and I went up there and couldn't find any and I believe he said he sent an order out for me.
> Q. How long before that, before the accident, did you report that? A. I guess two or three days before.

The Court: Had the wrench been slipping before that?

The Witness: Yes, she was.

Q. Where were the tools kept on this ship? A. In the engine room.

Q. Was there a place for them? A. There was a tool locker there.

Q. What do they call it? A. A tool locker.

* * * * * * *

Q. It was just a place where tools were supposed to be put when not in use? A. Yes, sir.

Q. You looked over all they had there? A. I did.

Q. You found no end wrench? A. That is right."

This is additional testimony as to the defectiveness of the wrench (R., 16):

"Q. I want you to take this open end wrench and just show the jury, using that to illustrate with, what you say was the matter with the other wrench? A. There was play in the jaws; it was worn.

* * * * * * *

Q. And what happened? A. It slipped.

Q. When it slipped what happened to you? A. I lost my balance and went off the platform and found myself in the passageway.

Q. What did you strike against? A. An angle iron."

The plaintiff was severely injured (R., 17), and has had constant pain of his whole side, with difficulty in breathing (R., 18-20). Several ribs were fractured (R., 7-31).

Petitioner on cross examination gave the following testimony:

"Q. On this day he (chief engineer) had a whole set of tools and wrenches, didn't he? A. No.

Q. Did you look in his tools? A. I did.

Q. And you didn't find any wrenches? A. Not one to fit.

* * * * * *

Q. He had adjustable wrenches, end wrenches, adjustable ones? A. No, he didn't.

Q. You don't know about that? A. No, he didn't have that; they didn't come on the boat" (R., 23).

Petitioner was cautious in the manner of performing his work. The nuts having required tightening Jacob braced himself when he placed the strain on the wrench. He did his work according to the course of experience—20 years (R., 26).

Proof of general custom, usage and practice, with regard to the supply of tools, wrenches, etc., was offered but the Court refused to allow it (R., 30).

On motion of the respondent that petitioner failed to offer proof and to introduce evidence sufficient to constitute a cause of action (R., 31), a motion was granted with an exception to petitioner, the Court holding that under the "simple tool doctrine" plaintiff could not succeed, and its authority for the ruling was the case of *Newbern* v. *Great Atlantic & Pacific Tea Company*, 68 Fed. (2d) 523 (R., 32).

The Court did not find that the petitioner gave any false testimony, nor was there any such suggestion. It was accepted as true.

The testimony given by petitioner was not contradicted. He stated that the superintendent was told that he would order another wrench but it was never done. Jacob's superior officer knew the one in use to be worn (R., 14). The request was made three times, "2 or 3 days before" (R., 14, 27). A socket wrench "could be used very handy" (R., 22) but there was none on board. What was needed and should have been provided was not done (R., 27).

The Circuit Court in affirming the ruling of the District Court overruled petitioner who endeavored to show that the respondent should have supplied a better and different tool.

The trial Court erred (R., 30) in refusing to permit the plaintiff to prove the difference between the type of wrench he was using and a proper one (R., 30). The trial Court should have submitted to the jury under the circumstances the issue of whether the respondent had exercised that degree of care required of it by law to furnish the employee with reasonably safe tools and equipment and a proper place to work.

The Circuit Court and the trial Court have both erroneously applied the so-called "simple tool doctrine" to a maritime tort and the former has erred in ruling "that the master has been guilty of no negligence with respect to the tool used by the employee" (R., 45).

The Decisions Appealed From.

Petitioner's action was brought under Sec. 33 of the Merchant Marine Act of 1920, Title 46, United States Code Annotated, Sec. 688 (commonly known as the Jones Act), which incorporated by reference the Railroad Employers' Liability Act, Title 45, United States Code Annotated, Secs. 51 to 59, to recover damages for personal injuries (first count), and maintenance and cure (second count). Petitioner was injured in the course of his work.

The case was tried in the District Court before the Honorable Isaac M. Meekins, District Judge, and a jury (petitioner having proceeded at law and demanded a jury trial pursuant to Rule 38 of the Rules of Civil Procedure for the District Courts), on February 29, 1940 and March 1, 1940. The Court upon petitioner resting his case entertained motions to dismiss the complaint. The motions were granted and the complaint dismissed (R., 31-42). Exceptions in both instances were allowed (R., 31-42).

The trial Court did not hear nor did the respondent present any proof or evidence (R., 31-42). The trial Court disposed of the issues on the merits and the Circuit Court of Appeals rendered its decision as aforesaid on petitioner's evidence alone.

The District Court refused to have the jury pass upon the facts and to determine them, but ruled on them itself, as a matter of law (R., 31-42).

The Circuit Court of Appeals rendered a per curiam opinion, 119 Fed. (2) 800. The Circuit Court sustained the District Court on the first count, i. e., the count for the damages for the personal injuries and reversed the count for maintenance and cure, with a direction that judgment on the latter count be entered for the amount offered by respondent in the District Court.

The entire matter was disposed of, and the Circuit Court found the facts against petitioner, holding as did the trial Court, that Jacob as a matter of law, could not have a recovery.

The Circuit Court in announcing and applying to the facts so found made a ruling as to the law, which, it is submitted was erroneous. Petitioner has been allowed a review of that ruling by this Court.

The Questions Presented.

Stated in broad terms, the questions are:

First—Whether a shipowner may have the benefit of the so-called "simple tool doctrine", heretofore unknown to the law of the sea, and the shipowner thus relieved of liability for personal injuries suffered by a seaman injured in the course of his employment while using a worn and only appliance available, where the shipowner has failed to provide a safe and proper appliance.

Second—Contrary to the evidence the Court below stated that petitioner had available for use, a proper appliance. Assuming that be so, the further question is whether the rule of comparative negligence, rather than that of assumption of risk applies to the seaman who has made use of a defective appliance, where a safe one is available.

Socony-Vacuum v. *Smith*, 305 U. S. 424.

Third—Whether a trial Court may exclude evidence of custom and practice as to the proper tools that should be supplied by a shipowner to seamen.

POINT I.

The "simple tool doctrine" is not applicable to seamen. The Jones Act, which incorporates by reference the Railway Servants Act, provides that it is a shipowner's duty to furnish a seaman with a seaworthy vessel, and safe and proper appliances and tools.

The statute is not permissive but mandatory upon an employer to furnish proper tools and appliances (Railway Servants' Act, Sec. 51, Title 45, U. S. C. A., incorporated by reference in the Jones Act). It provides that every employer

> "* * * shall be liable in damages to any person suffering injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its * * * appliances, machinery * * * or other equipment."*

A shipowner is obliged to provide its employees with a seaworthy vessel and with proper gear, appliances, equipment, devices and tools. The statute (Jones Act) applies to it as well as a carrier by rail.

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*The full text of the Jones Act and Railway Servants' Act are in the appendix on pages 19 and 20.

Sec. 688, Title 46, U. S. C. A. (Jones Act);
Sec. 51, Title 46, U. S. C. A. (Railway Servants Act);
Panama v. *Johnson*, 264 U. S. 375;
Pacific v. *Peterson*, 278 U. S. 130;
Socony-Vacuum v. *Smith*, 305 U. S. 424.

The evidence is clear and uncontradicted that the wrench was worn and defective (R., 12-13) and there was "not one to fit" available (R., 23).

Jacob being a seaman and entitled to the benefits of the Jones Act, should not have been deprived of his right to a jury trial. The Courts below should have applied the law applicable to this case, rather than a rule unknown or inapplicable to maritime torts.

In *The Seeandbee*, 102 Fed. (2d) 577, the Court, at page 581, ruled:

> "It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and this does not depend on the exercise of reasonable care, but is absolute. *H. A. Scandrett*, 2 Cir., 1937 A. M. C. 326, 87 F. (2d) 708."

In *Zinnel* v. *Fleet Corp.*, 10 Fed. (2d) 47, a dismissal in a law action in which the shipowner was charged with failure to provide a rope for decedent's safety was reversed and it was held:

> "* * * All we need, and do, hold is that under the law of master and servant, as now in force by statute, the circumstances were such as would allow the jury to find that there was no rope, and that its absence, made the intestate's place of work unsafe" (pp. 48 and 49).

Such was the situation herein. Respondent neglected to furnish Jacob with a suitable and proper wrench, as re-

quired. Petitioner's place of work was thereby rendered unsafe.

A shipowner warrants the seaworthiness of the vessel, and is obliged to provide the seaman with safe equipment, and this is implied in and is a part of the contract of employment. That is the law of the sea.

> *Rainey* v. *New York and Porto Rico Steamship Co.*, 216 Fed. 449;
> *Storgard* v. *France*, 263 Fed. 545, certiorari denied 252 U. S. 704.

The Jones Act gave additional remedies and increased the seaman's rights under the settled maritime law.

There has been no legislative enactment to modify or nullify this obligation of the shipowner to provide safe and suitable equipment and tools for the seaman's work, rather this Court has made clear that a shipowner failing to comply with its non-delegable duty must respond in damages to the injured employee:

> *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367;
> *Eugel* v. *Davenport*, 271 U. S. 33;
> *Socony-Vacuum* v. *Smith* (supra);
> *Pacific* v. *Peterson* (supra).

In the *Rainey* v. *New York and P. R. S. S. Co.* case (supra), the rule was enunciated as follows:

> "According to the general maritime law, there was an implied warranty on the part of the shipowner that the ship in question was seaworthy at the time of beginning the voyage in question" (p. 453).

It was satisfactorily established by petitioner that a safe and suitable wrench was not on the vessel for his use.

The trial Court should have submitted the issues to the jury; and the Circuit Court should have reversed the dismissal.

Crickett v. *Parry*, 263 Fed. 523, certiorari denied 252 U. S. 580;
U. S. S. B. v. *O'Shea*, 5 Fed. (2d) 123;
Storgard v. *France*, 263 Fed. 545;
Grimberg v. *Admiral Oriental Line*, 300 Fed. 619;
Ives v. *United States*, 58 Fed. (2d) 201;
Zinnel v. *Fleet Corporation*, 10 Fed. (2d) 47;
Stevens v. *O'Brien Co.*, 62 Fed. (2d) 632.

The cause of Jacob's injuries was respondent's failure to supply and keep the vessel equipped with sufficient and proper tools, and it was for the jury to determine the issue of negligence, not the trial Court, petitioner having duly sued under the Jones Act and demanded a jury trial, as permitted by the rules (supra).

This case is no different than the numerous cases that have been decided by the Courts in which it has been universally held that a shipowner is liable for failure to provide a rope, ladder, door hook, socket wrench, etc. The doctrine of simple tool is applicable to cases where an employer furnishes a tool which is defective in its manufacture or construction, such as an improperly tempered chisel which splinters or a bolt or a water glass that breaks because of inherent defect, and in such cases the courts hold and rightfully so that the employer, having made every reasonable effort to provide proper appliances, cannot be held liable for the inherent or latent defect of the instrument, but cases are lacking in which the simple tool doctrine has been held to apply to instruments which have become worn out and no longer fit for use or which was not the type or kind for the employee to use which should be removed from the vessel and replaced with new or better ones. The worn out wrench should have been replaced with a new, or better suitable

one. Respondent had ample time to do so—"two or three days" (R., 14). The petitioner does not, and did not below, contend that the instrument furnished him was inherently defective or improperly manufactured. He proved it was worn and unfit for use. There was no chipping or breaking. The slipping was due to its age, wear and tear, and also because it was the wrong kind of wrench for that purpose. The case would be no different were the petitioner to have furnished any other instrument resembling a wrench, but unfit for the purposes intended in the performance of Jacob's duties. Furthermore, Jacob had no choice of selecting a good wrench from a bad one, there having been no others available (R., 23-27). The rule requiring shipowners to furnish proper tools should not be relaxed. The employer should be held to the requirements, to exercise due care to furnish the necessary and safe tools.

A case similar to the one at bar is that of *Coast Steamship* v. *Brady*, 8 Fed. (2) 16, cert. denied 269 U. S. 578. It appears that a seaman was allowed a recovery by reason of the defendant's failure to provide a proper wrench. The Circuit Court of Appeals for the Fifth Circuit affirmed the award because, as it observed, at page 18:

> "Witnesses for the plaintiff and defendants agree that the ordinary barrel or socket wrenches are the kind which were suitable for the work being done on the occasion of plaintiff's injury, and that there were none on board of the necessary size."

And as further stated by it, at pages 18 and 19:

> "It has been held by the Supreme Court that the Merchant Marine Act (41 Stat. 988) is constitutional, and that the Employers' Liability Act (Comp. St. 8657-8665) which renders carriers by railroad liable to employees for injuries resulting by reason of *any*

defect or insufficiency in equipment, including appliances, was made applicable to steamships by the Merchant Marine Act as amended. *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748.

* * * * * *

The danger of the risk was a question of fact, to be determined by the jury. It is immaterial that the wrench used was a simple tool, as the suit is not based upon any defect or unfitness for the purposes for which the wrench was designed. In order to establish liability for negligence, it is sufficient if it appears that injury is a natural and probable consequence of the breach of duty. It is not necessary that the party at fault should have contemplated or anticipated that his negligence would cause the particular kind of injury which resulted; but a person guilty of negligence is liable for 'all consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind.' I Sherman & Redfield on Negligence (6th Ed., Section 29)." (Italics ours.)

In *Howarth* v. *Shipping Board*, 24 Fed. (2d) 374, the facts were briefly, that a door hook was broken off and a fire brick was used in its place to hold the door from which the said hook had been broken off. In reversing the judgment of dismissal and ordering the case back for a new trial, it was held (p. 376):

"It is argued that the fire brick was a safe door stop, and had worked well enough before; but a different inference may be drawn, and a jury ought to have been allowed to say whether the defendant should

have maintained a hook on the door to hold it securely back, or whether the brick provided in place of the missing hook was a reasonably safe appliance, in view of the tendency of ships to pitch and roll in rough weather. The dismissal of the cause of action to recover indemnity was error. If the door without the hook was unsafe, the *acts of defendants in furnishing an unsafe appliance would be negligence.* The Merchant Marine Act of 1920 allows recovery for negligence. 41 U. S. Stat. at Large, page 1007 (46 U. S. C. A., Sec. 688 [Comp. St., Sec. 8337a])." (Italics ours.)

In the case of *Ives* v. *United States*, 58 Fed. (2d) 201, a decree of dismissal in admiralty was reversed and a recovery allowed. Ives was engaged as a fireman on a voyage between New York and Norfolk. One of the ventilators could not be turned, and a pipe was being used in an effort to do so; it slipped off the handle, sprang back due to the fact that torsion had been exerted on the reach rod, striking appellant's eye. The Court held that:

> "With a reach rod as long as this, it should have been foreseen by the appellant's superior that the use of the pipe as described would cause a spring and incur the danger of a torsion of the rod. The leverage with the push and pull thereon would cause it. *The non-delegable duty to use due and reasonable care to make and keep the ship seaworthy, as well as her appliances, was upon the owners during the voyage.*" (Italics ours.)

In the case of *Storgard* v. *France* (supra) Judge Ward, speaking for a unanimous bench in reversing the judgment obtained by the defendant in the trial Court, stated the issue was:

> "The charge of negligence was that the owner permitted the bolt to become worn and defective, so that

the vessel was unseaworthy as to him. It will not be necessary to go into particulars, because the jury found a verdict for the defendant, and the only question to be decided is whether the court erred in charging them" (p. 546).

And held (p. 547):

"If the bolt was worn and defective, and the shipowners knew or ought to have known the fact, it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen. The evidence was that the sailors always used this ring on their way to the topmast. The seamen were bound to use the equipment and appliances which the owners furnished, and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use, at least free from defects known or which ought to be known."

In *Helmke* v. *United States*, 8 Fed. Supp. 521, Judge Borah in an admiralty action awarded a seaman damages by reason of the shipowner's neglect in failing to maintain a chain railing reasonably safe. A dog ran between the seaman's legs and threw him off balance, and Helmke in an effort to steady himself grabbed the railing which gave way beneath his weight. In making the award, the trial Court followed the well known rule that:

"The *respondent was obligated to provide reasonably safe equipment* for the libelant and I think it was a breach of that duty to him to fail to keep this chain railing reasonably safe for him and his fellow employees. When either through fault of the dog or otherwise the libelant lost his balance and involuntarily stumbled in the direction of and against the chain railing, *he would have been uninjured except for the negligence in failing to keep the chain railing safe.* There was no reason to suspect danger in allowing the

dog on board ship or even in playing with him, and it was the natural and probable consequence of *the negligent and wrongful failure to maintain a safe chain railing, that ought to have been foreseen in the light of the attending circumstances, that was the proximate cause of the injury*" (p. 522). (Italics ours.)

In the recent case of *McCarthy* v. *Palmer*, 113 Fed. (2d) 721, in which the defense of the simple tool doctrine was urged. The facts were briefly: A brakeman was injured while attempting to alight from a caboose when he slipped on a worn burlap rag nailed to the platform for a mat. The caboose was held to be defective, and the simple tool doctrine was not allowed. In rendering its opinion the Appellate Court held:

"The appellants contend that they are not guilty of any actionable negligence because of the condition of the bag tacked to the platform on the theory that the so-called simple tool doctrine, exemplified by such decisions as Newbern v. Great Atlantic & Pacific Tea Company, 4 Cir., 68 F. 2d 523, 91 A. L. R. 781, controls. That, however, fails to give adequate effect to the fact that the caboose was one of the cars the appellants were operating and that *its platform was defective because of the presence of the mat in its worn condition. That made the caboose a defective car.* It is true that the removal of the torn bag would have done away with the defect and that that would have been a simple thing to do but the ease with which the car would have been put into suitable condition for use does not alter the fact that it was actually defective due to the negligence of appellants or the fact that such negligence was the proximate cause of the plaintiff's injuries. If it does anything, it emphasizes that negligence." (Italics ours.)

POINT II.

The Circuit Court committed error in failing to follow and abide by the ruling of this Court in Socony-Vacuum v. Smith, 305 U. S. 424.

The Circuit Court stated that petitioner had a choice of tools. Assuming that he did have such choice, it should have under the circumstances reversed the dismissal and ruled as did this Court in *Socony-Vacuum Oil Company, Inc.* v. *Herbert A. Smith, Jr.* (supra), wherein the rule was definitely and clearly enunciated to be:

> "We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury".

These cases are quite similar. In the above case a loose step was involved and in the case at bar it was a loose wrench.

In the case of *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 Fed. (2) 745, the injured seaman while leaving the vessel chose a short ladder, although a longer one was available, and the Circuit Court of Appeals in reversing a judgment of dismissal and remanding the case for a new trial, made the following ruling:

"The appellee further urges that the plaintiff assumed the risk due to his choice of the shorter ladder. The choice of a defective appliance when a more appropriate one is available does not render assumption of risk a defense under the Jones Act when the plaintiff is on duty. Socony-Vacuum Co. v. Smith, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265."

POINT III.

A seaman should not be precluded from submitting evidence of custom and practice, as to what are proper tools that should be supplied by a shipowner.

The Court having decided that the doctrine of simple tool applied, it excluded custom evidence. This was error. It is well settled that a plaintiff should not be prevented from so doing.

Maibrunn v. *Hamburg American Line*, 77 Fed. (2d) 304;
Standard Oil Co. v. *De Vries*, 3 Fed. (2d) 852.

CONCLUSION.

The judgment of the Circuit Court of Appeals and of the District Court should be reversed and the case remanded with instructions that a new trial be given petitioner, and the jury be allowed to assess the damages suffered by him.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Petitioner.

DOMINICK BLASI,
of Counsel.

APPENDIX.

Sec. 688, Title 46, U. S. C. A.—The Merchant Marine Act, known as the Jones Act, reads as follows:

"Section 688. Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.)

The Railway Servants' Act, Title 45, U. S. C. A., Sec. 51, reads thus:

"Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the State or Territories and any

foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65.)

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 589.

WILLIAM JACOB,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

REPLY BRIEF OF PETITIONER.

SILAS B. AXTELL,
Attorney for Petitioner,
William Jacob.

DOMINICK BLASI,
of Counsel.

ACKERMAN PRESS, Inc., 302 East 44th St., 'Phone VAnderbilt 6-1898

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Statement.

The statement of facts is fully stated in petitioner's brief heretofore filed herein. This reply is made in response to respondent's brief and the argument therein presented.

Argument.

The cases cited by respondent do not apply to the questions involved herein.

The petitioner's suit is in personam, against the employer, under the Jones Act, "the new rule", Pacific v. Peterson, 278 U. S. 130, 139. The following cases cited by

the respondent concern suits in rem, against the vessel, in which the old maritime rules alone could be applied, and are therefore inapplicable here:

Birkenhead, The, 51 F. (2d) 116 (pp. 12, 16 and 17, respondent's brief);
Cricket, The, 71 F. (2d) 61 (p. 23, respondent's brief);
Plamals v. Pinar Del Rio, 277 U. S. 151 (p. 17, respondent's brief);
Tawmie, The, 80 F. (2d) 792 (p. 23, respondent's brief).

In Plamals v. Pinar Del Rio (supra), it was decided by this Court that the Jones Act, though creating a cause of action for personal injuries, did not create a lien for enforcing it, in rem. All of the above cases cited by respondent follow the Plamals case.

The case of Kilday v. Jahncke Dry Dock & Ship Repair Company, 281 Fed. 133 (pp. 16 and 17, respondent's brief), is likewise not applicable. The employee there charged that there was a failure to test the tool, but Jacob has not so contended, but has proved it was worn out (R. 12) and that there was a failure to supply a proper one (R. 14 and 23), as required by the statute. Jones Act and Railway Servants' Act (infra).

The case of Marsh v. Chickering, 101 N. Y. 396 (pp. 12, 15 and 23, respondent's brief) was decided in 1886, many years before the enactment of either the Jones Act or Railway Servants' Act, and concerned a tort under the old common law, wherein contributory negligence and assumption of risk were complete defenses. These rules were abolished by statute in cases of seamen. The Jones Act, Section 33, Title 46, U. S. C. A., which incorporated by reference Section 51, Title 45, U. S. C. A. Its (Jones Act) purpose is clearly stated by this Court in Arizona v. Anelich, 298 U. S. 110, at page 123 thus:

"Like considerations, and others to be mentioned, require a like conclusion with respect to the modified and in some respects *enlarged liability* imported into the maritime law by the Jones Act. The legislation was *remedial*, for the *benefit and protection of seamen* who are peculiarly the wards of admiralty. Its *purpose was to enlarge that protection, not to narrow it.* Cf. Chelentis v. Luckenbach S. S. Co., supra. Its provisions, like others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end (citing cases)." (Italics ours.)

O'Brien v. Missouri, Kansas & Texas Ry. Co., 36 Tex. Civ. App. 528, 82 S. W. 319 (p. 13, respondent's brief), was decided in 1904, four years before the Railway Servants' Act and is clearly not applicable, it not having been a suit under the statute in question.

Garnett v. Phoenix Bridge Company, 98 Fed. 192 (p. 13, respondent's brief), also relied on by respondent, was decided in 1899, 9 years before the enactment of the Railway Servants' Act and 21 years prior to the Jones Act.

The case of Allen Gravel Company v. Yarbrough, 133 Miss. 652, 98 So. 117 (pp. 16 and 21, respondent's brief), concerned a tort under state laws and was not a seaman's action under the Jones Act. It, likewise, is not applicable to the case at bar.

Hedicke v. Highland Springs Company, 185 Minn. 79, 239 N. W. 896 (1931) (pp. 19 and 21, respondent's brief), did not involve a seaman's or railway servant's action. The suit was governed by the common law of Minnesota, not the federal statutes involved herein.

It is apparent that respondent's argument being based upon cases not applicable that its reasoning is untenable.

In view of respondent's Point I, by which it urges that petitioner was required to prove negligence on the part of the shipowner, we wish to point out that petitioner does not argue that he was not required to make prima facie

proof of negligence, but maintains that a cause of action was proven by him under the Jones Act for respondent's negligence. Having so proven his claim, he was entitled to have the jury determine the issues; and the Courts below were in error in applying an old common law doctrine followed by the Courts of the several states, only in cases where contributory negligence and assumption of risk are applicable as matters of defenses, but Congress abrogated these defenses in seamen's cases, save, only to affect the amount of recovery, if there be contributory negligence. Moreover, the question of the rule itself, even in the cases relied upon by respondent has to do with a duty "to inspect", "duty of inspection" (respondent's brief, p. 15), "inspection" (p. 16), "ascertaining defects" (p. 17), "to discover defects", etc. (p. 19), "to inspect" (p. 20); whereas here the worn out condition of the tool had been reported (R. 14). Respondent either misinterprets, or seeks to misapply them, to establish a doctrine (as expressly contended for, p. 18, respondent's brief) that, *where ascertained and reported*, it is "primarily the *employee's* duty to *remedy the defect*". Such a proposition is not supported by any authority and is manifestly wrong. It would require the seaman instead of the shipowner to supply "appliances, machinery, * * * or other equipment" (Statute, Sec. 51, petitioner's brief, pp. 19-20), directly contrary to the act.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Petitioner.

DOMINICK BLASI,
of Counsel.

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(28747)

Supreme Court of the United States

No. 589. October Term, 1941

WILLIAM JACOB,
Petitioner,
against
THE CITY OF NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

WILLIAM C. CHANLER,
PAXTON BLAIR,
ALFRED T. WHITE,
Counsel for Respondent,
Municipal Building,
New York, N. Y.

September 11, 1941.

Supreme Court of the United States

No. 589. October Term, 1941

WILLIAM JACOB,
Petitioner,
against
THE CITY OF NEW YORK.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

In an action under the Jones Act, 41 Stat. 1007, 46 U. S. Code, tit. Shipping, § 688, brought by a ferry-boat employee for negligence causing injuries, the District Court of the United States for the Southern District of New York (MEEKINS, J.) dismissed the cause of action for damages at the close of the plaintiff's case (R. 39). Defendant's offer to consent to a judgment for loss of wages was rejected by the plaintiff's attorney. The Circuit Court of Appeals affirmed the dismissal of the first cause of action in an opinion per curiam, but *sua sponte* allowed the plaintiff a recovery for loss of wages. 119 F. (2d) 800.

1. The facts show the defendant was not guilty of negligence.

Negligence was sought to be premised on the act of the defendant in supplying to the plaintiff, who was in charge of the boiler room on one of defendant's ferry-boats, an open-end, S-shaped wrench which was worn and failed to fit

tightly the nut to which it was applied. The wrench slipped under pressure, and this caused the plaintiff to lose his balance, fall and break three ribs.

The plaintiff had been in the ferry-boat service for twenty years (R. 13-14). His job required him three times a week to unscrew the nuts from the manifold head, change the oil strainers under the plate, and replace the head and make the bolts tight. This job he had been doing on this vessel for three weeks before the accident, and had never suffered a mishap. He was using a wrench of the type regularly used on this work (R. 21, 27).

The plaintiff admitted that wrenches often slip when "a great deal of strain" (R. 30) is applied, without there being any defect in the wrench, and that they often slip off nuts from a variety of causes (R. 31-32), depending upon how the wrench is used (*ibid.*). The plaintiff's testimony as to this is of decisive significance (R. 31):

> "Q. What was it you braced yourself on when you put the strain on the wrench? A. A rod coming down from the deck of the ship; I guess it was to hold the catwalk up.
>
> • • • • • • • •
>
> Q. You didn't hold with your hand? A. No, I was pressing myself against that.
>
> Q. In your experience hadn't you found before if you put that much strain on a wrench on a nut it is very apt to slip, any wrench or any nut? Isn't that true? A. Yes.
>
> Q. And that is particularly true when the nut has been in use before and the wrench has been in use before? A. That is true.
>
> Q. That is the usual course of experience, isn't it? A. That is right."

The plaintiff testified in support of his claim that "about two days before" the accident he inquired from the chief

engineer about getting a new wrench (R. 30), and the latter told the plaintiff to look in the tool closet; and that when he did not find any new wrench like he had been using the chief engineer then sent out an order for a new one (R. 19). Later, on cross examination the plaintiff admitted that, although no new wrench like the one he had been using was immediately available, there were other wrenches on board which were suitable for the purpose and could have been used if necessary, and which he had used many times in the past, such as adjustable monkey wrenches and Stillson wrenches (R. 29). It was also brought out that this ferry-boat, which plies between South Ferry, Manhattan, and Staten Island, docked 6 or 7 times a day at each place, where there are storerooms, and the plaintiff could have secured a new wrench, if it was necessary, but did nothing about securing one (R. 30).

2. The "simple tool doctrine" is applicable to the case, and was correctly stated and applied by the Court below.

The opinion of the Court below (LEARNED HAND, SWAN, and A. N. HAND, Cir. JJ.) stated the applicable law thus (119 F. [2d] 800, at pp. 801-802):

> "In taking the first cause of action from the jury the trial judge relied on what is sometimes called the 'simple tool doctrine'. See *Newbern* v. *Great Atlantic & Pac. Tea Co.*, 68 F. 2d 523, 91 A. L. R. 781 (C. C. A. 4). This so-called doctrine is but a short hand method of saying that the employer's duty to use reasonable care for the safety of his workmen does not require him to test or inspect ordinary simple tools from the use of which no danger is reasonably to be expected and as to which the employee is in a better position than the master to discover defects

> resulting from wear and tear and to protect himself against the risk of using the tool, if defective. In other words, the probability of any danger against which the employee cannot reasonably be expected to guard himself is so remote as to relieve the master of the duty of inspecting such simple tools or of warning his employee against the use of them if they show signs of wear. *McMillan* v. *Mineto Shade Cloth Co.*, 134 App. Div. 28, 31, 117 N. Y. Supp. 1081; *Miller* v. *Erie R. Co.*, 21 App. Div. 45, 47, 47 N. Y. Supp. 285."

The Court went on to point out that nothing in the Jones Act forbade the application of the doctrine to the facts in the record, saying (p. 802):

> "The master's freedom from liability is not because the employee has been negligent or has knowingly assumed the risk—both contributory negligence and assumption of risk being excluded as defenses under the Jones Act—but because the master has been guilty of no negligence with respect to the tool used by the employee."

The Court then adverted to the ready availability of other wrenches, saying (p. 802):

> "In the case at bar, the plaintiff was at liberty to select such tools as he thought suitable for the work in hand; he was not acting under orders in using the worn wrench; if the wrench was in such condition that he thought its use dangerous, he was under no necessity of using it, for a monkey wrench, admittedly suitable, was at hand. Under these circumstances the master had no reason to suppose that the plaintiff would use a wrench so worn as to create a situation of danger. Consequently we think the trial judge was right in not leaving to the jury the issue of negligence."

3. The doctrine is well established. No conflict of decisions among the Circuits exists. Nor were pertinent authorities in this Court overlooked.

Decisions in accord with that sought to be reviewed have been rendered in several other Circuits and Districts. See, *inter alia*, the following: *Newbern* v. *Great Atlantic & Pacific Tea Co.*, 68 F. (2d) 523, 91 A. L. R. 781 (4th Circ., 1934); *Spain* v. *Powell*, 90 F. (2d) 580 (4th Cir., 1937); *Field* v. *Waterman S. S. Corp.*, 104 F. (2d) 849 (5th Cir., 1939); *Pittsburgh S. S. Co.* v. *Palo*, 64 F. (2d) 198 (6th Cir., 1933); *American Pacific Whaling Co.* v. *Kristensen*, 93 F. (2d) 17 (9th Cir., 1937); *The Birkenhead*, 51 F. (2d) 116 (D. C., E. D., Pa., 1930).

This Court's decision in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (1939), establishes nothing in conflict with our contentions. There negligence on defendant's part was shown, viz., a loose step in the engine room of petitioner's vessel; and it was held that the contributory negligence on plaintiff's part, which was also established, did not defeat recovery but that the comparative negligence rule was rightly applied by the Courts below.

In the case at bar, the plaintiff never got past the initial hurdle of showing negligence on defendant's part. The defendant was not an insurer. *The Cricket*, 71 F. (2d) 61, 63 (9th Circ., 1934); *The Tawmie*, 80 F. (2d) 144, 147 (5th Circ., 1936). We may confidently apply to the instant case the observations of this Court in *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343 (1932):

> "We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before

evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' *Pleasants* v. *Fant*, 22 Wall. 116, 120-121."

Conclusion.

We submit that what the plaintiff has obtained—the review of the Trial Judge's decision by a Bench of three Circuit Judges, their unanimous concurrence in what was done below, the award *sua sponte* of relief, representing lost wages, which his own counsel had haughtily rejected (R. 41)—is all that substantial justice requires; and as no public interest or importance attaches to the case, the plaintiff should not be allowed a further review.

The Petition for Certiorari should be denied.

September 11, 1941.

Respectfully submitted,

WILLIAM C. CHANLER,
PAXTON BLAIR,
ALFRED T. WHITE,
Counsel for Respondent.

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Supreme Court of the United States

No. 589. October Term, 1941

WILLIAM JACOB,
Petitioner,
against
THE CITY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

February 11, 1942.

WILLIAM C. CHANLER,
Corporation Counsel
of the City of New York,
Counsel for Respondent,
Municipal Building,
New York, N. Y.

PAXTON BLAIR,
ALFRED T. WHITE,
DEON SHAW,
of Counsel.

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Supreme Court of the United States

No. 589. October Term, 1941

WILLIAM JACOB,
Petitioner,
against
THE CITY OF NEW YORK.

RESPONDENT'S BRIEF.

The plaintiff has obtained a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, unanimously affirming so much of a judgment of the United States District Court for the Southern District of New York (MEEKINS, J.), as dismissed, at the close of the plaintiff's case, the first cause of action in a complaint brought to recover for bodily injuries. The Circuit Court of Appeals, however, directed the entry of judgment in favor of the plaintiff for wages lost. The action was begun under the Jones Act by a member of the crew of a municipally owned ferry-boat, who, while the vessel was in the navigable waters of the United States, lost his balance and fell from a platform, eighteen inches high, striking a railing and breaking three ribs. At the moment of the mishap he was tightening with a wrench the nuts on a manifold head (R. 11), which he was replacing after having cleaned the strainers housed in it; and the cause assigned was the presence of a "play" of 1/16 of an inch in the jaws of the wrench, so that it slipped under the torque applied to it, throwing the man off his balance.

The fundamental issue is whether, in allowing a wrench with this defect, slight though it was, to remain aboard the vessel, so that a workman could select it from a group of wrenches and use it, was negligence on the defendant's part.

The opinion below, answering this question in the negative, is reported in 119 F. (2d) 800.

The Pleadings.

(1)

The essence of the complaint is found in Par. EIGHTH, which alleges (R. 3):

> "EIGHTH.—That on the aforesaid date, while the ferryboat was at the place aforesaid, plaintiff was changing oil strainers, and, while in the course of his said employment, suddenly and without notice the wrench with which he was working slipped and plaintiff was caused to be precipitated from and fall off a platform * striking and landing on a catwalk or grating with such great force and violence as to sustain serious, severe and permanent personal injuries."

Negligence is alleged in Par. TENTH and is said to reside in the fact that (R. 3)

> "the defendant failed to provide plaintiff with a safe and seaworthy vessel and with a safe and proper place in which to work, and it failed to keep the vessel, its gear, appliances, equipment and devices in a safe and proper condition and in a sane and proper state of repair; that the said ferryboat, its gear, appliances, tools and devices were old, worn and defective, and unfit for use; that the defendant failed

* Not a very high platform. Its height was 18 inches (R. 11).

to take such care and caution as was necessary to protect the safety of plaintiff's life and limb."

(2)

The answer consists of a general denial, coupled with an admission of a statutory liability for lost wages, and maintenance and cure,* and an affirmative defense, which was that plaintiff's injuries (R. 5)

> "were suffered or sustained through the negligence of the plaintiff or through the intervention of a cause or causes over which the defendant, its agents, servants or employees had no control or in no wise are or were responsible therefor."

Questions Presented.

We are not ready to concede the accuracy of the petitioner's statement of the issues, outlined at page 7 of his brief. He indulges in unwarranted assumptions as to underlying facts. We submit that the issues are (1) whether in actions under the Jones Act negligence must be proved to sustain a recovery; (2) whether, assuming such proof is essential, the burden was met by merely showing that the defendant furnished to a workman, or exposed to his selection, a number of wrenches one of which had the defect, not only patent but known to plaintiff, of slightly worn jaws; and (3) whether the petitioner had the right to put in opinion testimony that the best type of wrench for the work the plaintiff was doing was a wrench of a type which had never been in use for that work.

---

* Of course the shipowner's liability for lost wages, maintenance and cure is contractual in its origin, and is not dependent on negligence. *Pacific Steamship Company* v. *Peterson*, 278 U. S. 130, 137 (1928); *Marshall* v. *International M. M. Co.*, 39 F. (2d) 551, 553 (2nd Circ., 1930).

Facts.

1. The actual happening of the accident.

The plaintiff, just before the accident, was working in the boiler room, starboard side, changing oil strainers. He was acting in the capacity of water-tender in charge of the boiler-room, and was not acting under the orders or supervision of another but was in full control of the work, with unrestricted power to select the tools and methods for the best accomplishment of his task (R. 23-24). The process of changing oil strainers required him to remove the head of the manifold, which apparently housed several strainers; and this process, in turn, required removing and replacing certain nuts and bolts. He then said (R. 11):

> "Q. How many bolts or nuts did you have to move to take off the strainer? A. Six.
>
> Q. What did you stand on doing that? A. We had a platform there about 18 inches square.
>
> Q. How high? A. About 18 inches off the catwalk.
>
> The Court: The standing room is 18 inches square?
>
> The Witness: Yes.
>
> Q. You mean it was a square box 18 inches square? A. Yes."

As to the accident itself, he said (R. 12):

> "Q. And you were using a wrench when something happened? A. That is right.
>
> Q. What happened? A. In taking off these bolts and putting them on they have to be very tight, and I put a strain on them and the wrench slipped and I had nothing to grab * and I fell and hit an angle iron.

---

* On cross examination (R. 25), he admitted he did have an iron rod on which to hold.

Q. Will you describe that wrench? A. The wrench was well worn.

Q. What do you mean? A. It had seen a lot of service. It had a lot of play on it."

But the "lot of play" was defined a little later as merely 1/16 of an inch; for he went on to testify (R. 16):

"A. There was play in the jaws; it was worn.

Q. How much play was there? A. A sixteenth of an inch."

The wrench was not an adjustable wrench, but an open-end, S-shaped wrench, and the jaws which were being used were formed to fit a ¾ inch nut. The plaintiff was specific in stating, and his counsel in conceding, that he attributed the accident only to the condition of the wrench (R. 13, 15), viz., the above mentioned "play" in the jaws, which made it a "loose fit".

In spite of the attempt to relate the accident to a particular condition of a particular wrench, the plaintiff on cross examination admitted that any wrench, good or bad, would sometimes slip, for he said (R. 26):

"Q. In your experience hadn't you found before if you put that much strain on a wrench on a nut it is very apt to slip, any wrench or any nut? Isn't that true? A. Yes.

Q. And that is particularly true when the nut has been in use before and the wrench has been in use before? A. That is true.

Q. That is the usual course of experience, isn't it? A. That is right.

Q. Nothing odd about that. As a matter of fact, you have worked around machinery for how long? A. About 20 years.

Q. And this is not the first time you have had a wrench slip off a nut? A. Probably not.

Q. It happens all the time; it happens every so often, doesn't it? A. Oh, no.

Q. Well, wrenches slip off nuts for a number of reasons?

The Court: You have been over that. He says they do."

And it would seem that the likelihood of slipping increases as the tightening progresses, for he said (R. 26):

"Q. How many times did you change the wrench on the nut while you were tightening it up? A. I got about four tightenings before the thing slipped.

Q. In other words, you turned it so far and put it back on and turned it again? A. Yes.

Q. How much thread was there on this bolt? A. About 5/8.

Q. 5/8ths of an inch? A. Yes, sir.

Q. Was there as much thread as there was on this bolt you have in front of you—I mean the nut? A. Just about.

Q. So in all you changed your wrench on the—

The Court: He said he did four times at least.

Q. Four or five times? A. Yes.

Q. Did you do it four times before you put it on the last time?

The Court: That is what he said."

2. The extent of plaintiff's experience with wrenches.

The plaintiff had done this kind of work on municipally owned ferryboats for twenty years (R. 9). The particular job of cleaning strainers, and hence of incidentally removing and replacing manifold heads, *with this very wrench* (R. 25), he had been doing three times a week for about three weeks (R. 12).

3. Availability of other wrenches.

Asked whether there were any other wrenches on the vessel that would fit a ¾ inch nut, he at first said that there were not (R. 14). But this inherently unlikely story was repudiated on cross examination, for he said (R. 23-24):

> "Q. Did he have what is commonly called monkey wrenches? A. I believe he did.
>
> Q. Of course, you can use that on any nut? A. Probably.
>
> Q. You have used them lots of times yourself, haven't you? A. Yes.
>
> Q. You have used monkey wrenches and Stillson wrenches lots of times on all kinds of nuts, haven't you, and you say this nut [Pl. Ex. 1, for ident., R. 16] was just like the nut you were working on? A. Yes, sir."

He thus admitted that other wrenches were available, and he had previously said that when he asked for a new, open-end wrench, the engineer, he believed, had "said he sent an order out for one" (R. 14).

Moreover, this ferry-boat docked in New York and in Staten Island six or seven times a day (R. 24), and if he had been in any real need of a new wrench he could have gotten one.

He stated dogmatically that an open-end wrench was the type generally used for removing the studs or nuts on strainers and cylinder heads (R. 16), a fact to which we shall recur in Point III, *post*.

Statutes Involved.

The text of the pertinent statutes (41 Stat. 1007, § 33; and 35 Stat. 65, § 1) is correctly given in petitioner's brief, pp. 19-20.

Opinion Below.

The Circuit Court of Appeals handed down an opinion *per curiam*, in which they stated briefly (1) that proof of negligence was part of the case of a plaintiff suing under the Jones Act; (2) that the simple tool doctrine applied; and (3) that the dismissal of the complaint was proper, not because of any negligence on the plaintiff's part, nor because of any assumption of risk by him, but because the plaintiff had not proved negligence on the defendant's part. They stressed these facts (R. 45-46):

> "In the case at bar, the plaintiff was at liberty to select such tools as he thought suitable for the work in hand; he was not acting under orders in using the worn wrench; if the wrench was in such condition that he thought its use dangerous, he was under no necessity of using it, for a monkey wrench, admittedly suitable, was at hand."

The Court referred to the "irritable refusal" of petitioner's counsel to take a judgment for lost wages, and *sua sponte* awarded him a judgment on that cause of action, while affirming a denial of relief on the cause of action for negligence.

Argument.

Upon the record as outlined above, we shall argue as follows:

1. A plaintiff in an action under the Jones Act is required to prove that negligence on the part of the shipowner was the cause of the injuries sustained.

2. Evidence that the defendant furnished, among other wrenches, one which had, through wear, a play of 1/16 of an inch in the jaws, does not constitute proof of negligence.

3. Since the plaintiff had complete familiarity with the type of wrench furnished for the work he was doing, and testified himself that it was the kind customarily and generally employed for the purpose at hand, it was not error to exclude opinion testimony as to the superior merits of another type of wrench.

POINT I.

A. plaintiff in an action under the Jones Act is required to prove that negligence on the part of the shipowner was the cause of the injuries sustained.

The Court will recall that the scheme of the two statutes from which the plaintiff's right is derived, is to extend to seamen the common-law rights and remedies to recover for personal injuries which are enjoyed by employees of common carriers by railroad in interstate or foreign commerce. The Federal Employers' Liability Act, in both the caption and the body of § 51, refers specifically to the liability of carriers for injuries to employees from "negligence". And his counsel, in drafting the complaint, took pains to allege negligence specifically (Par. TENTH, fourth line [R. 3]).

It would seem clear beyond argument, therefore, that when a seaman elects to sue under the Jones Act, which incorporates by reference the Employers' Liability Act, he is required to prove negligence as defined by the common-law. In fact, one of the earliest cases attacked (unsuccessfully) the constitutionality of the Jones Act, on the theory that Congress could not bring into the maritime law common-law rules of liability. See *Panama R. R. Company* v. *Johnson*, 264 U. S. 375 (1924). In this case the plaintiff sought to recover damages for personal injuries, "charging that the

injuries resulted from negligence of the employer in providing an inadequate ladder * * * "(p. 382). The Court, because of the obvious inadequacy of the tool furnished, affirmed a judgment in the plaintiff's favor and pointed out that since Congress had, under the constitution, the power to alter, qualify or supplement maritime rules, there was no reason why it might not bring into them "relative conformity to the common-law rules or some modification of the latter, if the change be country-wide and uniform in operation" (p. 388).

In *Pacific Steamship Company* v. *Peterson*, 278 U. S. 130 (1928), the Court, in discussing the alternatives open to a seaman under the Jones Act, expressly referred to "the right under the new rule to compensatory damages for injuries caused by negligence" (pp. 136-137), and pointed out wherein it differed from preexisting rights enjoyed by seamen under the maritime law. The clear import of this language, therefore, is that when the seaman elects to sue under the Jones Act, proof of negligence is essential to his recovery.

The *Peterson* case by the way, held that a plaintiff had the right to do that which was done by the plaintiff in the case at bar, to-wit, combine in one complaint a cause of action under the Jones Act for personal injuries based on negligence, with a cause of action under the general maritime law for loss of wages, maintenance and cure.

In *Beadle* v. *Spencer*, 298 U. S. 124 (1936), the Court referred to the Jones Act as a statute "which specifically imposes [on shipowners] liability for negligence of officers and fellow employees, and for defects in equipment due to negligence" (p. 128).

The decisions of this Court were subjected to careful scrutiny in *Kunschman* v. *United States*, 54 F. (2d) 987 (2nd Cir., 1932). The proof which a seaman was required

to put in before he could recover under the Jones Act was thus stated (p. 989):

> "• • • it is not enough to show that the ship was unseaworthy, but it must appear that the death was caused by negligence chargeable in law to the employer."

It seems hardly necessary to add that when the word "negligence" was used in the Federal Employers' Liability Act and carried by cross-reference into the Jones Act, we are to look to the common law for the conventional definitions of negligence. It was so held in *Escandon* v. *Pan-American Foreign Corporation*, 88 F. (2d) 276, 277 (5th Circ., 1937), and in *Pittsburgh Steamship Company* v. *Palo*, 64 F. (2d) 198, 200 (6th Circ., 1933), both of which exhibit careful attention to the decisions of this Court and employ reasoning which should commend itself to this Court. See also *Phillips* v. *Chicago, Burlington & Quincy R. Co.*, 119 Neb. 182, 227 N. W. 931 (1929).

POINT II.

Evidence that the defendant furnished, among other wrenches, one which had, through wear, a play of 1/16 of an inch in the jaws, does not constitute proof of negligence.

1. In determining whether negligence was proved, the plaintiff's familiarity with this particular wrench, gained through its repeated use, is a factor of primary importance.

No authority need be cited for the proposition that in determining whether a defendant has or has not been negligent, the inquiry cannot be conducted *in vacuo* but only in the light of relevant factors—one of which is the plain-

tiff's own attributes and capacities.* A companion-way for passengers, for instance, must be more carefully constructed and better equipped with protection against slipping, than a companion-way to which only the crew have access. The agility of a sailor exceeds that of the average passenger.

So here, whether negligence on defendant's part was the cause of the accident, must be determined in the light, *inter alia*, of these factors:

(*a*) the plaintiff had been doing this kind of work on municipal ferryboats for 20 years (R. 9);

(*b*) he had been working for three weeks with the very wrench he had in his hand when injured (R. 25);

(*c*) he had performed the very operation of removing and replacing the manifold nine times without misadventure of any sort (R. 12-13).

2. By the weight of authority, it is not negligence to provide, among several others, a loose-jawed wrench, which the employee might select.

Strikingly similar on its facts to the case at bar is *The Birkenhead*, 51 F. (2d) 116 (D. C., E. D. Pa., 1930). Here the seaman was injured when the slipping of a monkey wrench threw him off his balance. The Court stated the issue thus (p. 117): "Is unseaworthiness established by evidence that a defective appliance was supplied at a place where the libelant would naturally select it for his use, there being plenty of sound appliances adapted to the same work on board and readily accessible to the libelant?" The Court found, as facts, that other wrenches were available

*The New York cases take this view. See *Marsh* v. *Chickering*, 101 N. Y. 396, 399-400 (1886).

(as both Courts below did in the case at bar [R. 32, 35, 36, 45, 46]), and also that a monkey wrench was a proper and reasonably safe appliance for the work the libelant was doing when injured. Recovery for the injury was denied, but, as in the case at bar, the libelant recovered for lost wages, maintenance and cure, since the shipowner's liability in this regard is contractual and not based on negligence or unseaworthiness.

In *Garnett* v. *Phoenix Bridge Company*, 98 Fed. 192 (C. C. E. D. Pa., 1899), the plaintiff was injured when a wrench, with which he was tightening a bolt, unexpectedly opened, causing him to lose his balance and fall, sustaining injuries. The Court, after entering judgment for the defendant, denied plaintiff's motion for a new trial and said (p. 195):

> "• • • I am of opinion that, where the implement, though defective, might, and commonly and generally would, be used without the slightest risk, the master is not called upon to apprehend the occurrence of an extraordinary mishap which he could not have reasonably contemplated as a probable consequence of the existence of the defect."

The Court added (p. 196):

> "• • • the notion that the conductors of the vast industrial enterprises which distinguish our age and country are deficient in ordinary prudence if they do not take care that none of the many to whom they give employment shall be hurt through the breaking of a handsaw, a hammer, or a wrench, is repugnant to common sense and defamatory of the law."

In *O'Brien* v. *Missouri, Kansas & Texas Ry. Co.*, 36 Tex. Civ. App. 528, 82 S. W. 319 (1904), an employee in a machine shop was injured when a wrench with loose jaws

slipped off of the nut, causing him to lose his balance and fall. The Court denied recovery and said (p. 531):

> "If it can be said under this evidence the wrench was furnished plaintiff by defendant, still we are of the opinion no duty of inspection on the part of defendant was shown. During the trial four witnesses, who qualified as expert machinists and examined the wrench identified by plaintiff, testified 'that it appeared to have been of the proper material and properly made originally, but was simply worn out; that the sides appeared to have been worn, thin and weak by constant friction; that they would consider it an old, wornout wrench, and that they could see no other defect in it.' We are of the opinion that defendant in leaving a wornout wrench on the floor of the roundhouse, could not reasonably have anticipated or foreseen that the plaintiff or any other employé would, under the facts shown, make use of the same, and as a result sustain an injury."

Coast S. S. Co. v. *Brady*, 8 F. (2d) 16 (5th Circ., 1925), cert. den. 269 U. S. 578 (1925), cited by Petitioner (brief, pp. 12-13), is readily distinguishable. The wrench there furnished was stated by the defendant's own witnesses to be unfit for the purpose the seaman was trying to accomplish; for the wrench was a flat, open-end one, and the nuts were inset or depressed beneath the surface of the plate they held in place.

In the instant case, the plaintiff admitted the entire adequacy of the type of wrench supplied (*ante*, p. 7).

3. The "simple tool doctrine", which extends to maritime cases, is well established by authority, and was properly relied on by the Courts below in giving judgment for the defendant.

(a)

A clear statement of the simple tool doctrine is found in the American Law Institute's *Restatement of the Law of Agency*, Vol. 2, § 503, comment *d* (pp. 1180-1181):

> "*d. Duty of inspection on user.* A master is not liable for harm caused by instrumentalities used by the servant if the servant is given the opportunity and has the capacity to inspect and to test them before use, or could readily see their defects, except where the agent relies, as the master has reason to know he would, upon a prior inspection by the master. Hence, in the case of simple tools, the defects in which are readily observed by the servant using them, or discoverable by simple tests, the master is not subject to a duty to inspect them.
>
> Likewise, if the master provides safe instrumentalities, he is not liable if a servant, after proper instruction and an opportunity for examination, selects an unsafe instrumentality which is also supplied."

See also *Marsh* v. *Chickering*, 101 N. Y. 396, 400 (1886); *Crégan* v. *Marston*, 126 N. Y. 568 (1891). As was said in *O'Hara* v. *Brown Hoisting Machine Company*, 171 Fed. 394, 396 (3rd Circ., 1909):

> "To fasten on the master the duty of inspection with respect to such common and ordinary tools would place an undue and frequently insupportable burden on his shoulders, unreasonable to require and forbidden by the exigencies of business."

There can be no doubt that a wrench is a "simple tool". *The Birkenhead, supra.* See also *Allen Gravel Company* v. *Yarbrough*, 133 Miss. 652, 98 So. 117 (1923). Here the plaintiff below was tightening bolts holding in place the plates connecting the rails of a railroad track, using an open-end wrench with a long handle. The wrench had become worn, and on the occasion of the injury it had suddenly slipped, causing the employee to lose his balance and fall. The Court reversed a judgment for the plaintiff and directed the entry of judgment for the defendant, saying (p. 658):

> "The appellant presents as his assignment of error that he should have had a peremptory instruction on the theory that the wrench was a 'simple tool,' and that there was no negligence on the part of the master in furnishing a 'simple tool,' and that consequently there was no breach of duty upon which the negligence could be predicated. Is the track wrench above described a 'simple tool'? In our opinion it is. The wrench above described is as simple as the ordinary wrench used in the common and simple affairs of life, such as sewing machine wrench, wagon or buggy wrenches, or similar wrenches used for loosening or tightening nuts. In our view the tool is very simple. Its condition may be seen at a glance. The slightest inspection will disclose its condition. There is no complication whatever about it. The fact that the wrench was used in an employment which was not common to all persons makes no difference in this respect. It is true that it is larger than the ordinary tool used around a household, but its principle of construction is no different, and the only difference is that a great force is to be used and applied in the case of a track wrench."

(b)

In applying the doctrine to a maritime case, the Court below had the sanction of authority. See *Kilday* v. *Jahncke*

Dry Dock & Ship Repair Co., 281 Fed. 133 (5th Circ., 1922); *Pittsburgh S.S. Co.* v. *Palo*, 64 F. (2d) 198 (6th Circ., 1933); *Field* v. *Waterman S.S. Corp.*, 104 F. (2d) 840 (5th Circ., 1939); *The Birkenhead, supra*, page 12.

In *Kilday* v. *Jahncke Dry Dock & Ship Repair Co., supra*, the libelant was cutting off the ends of rivets with a chisel. A chip broke off from the blade and injured his eye. He sued in admiralty and alleged negligence in the defendant's failure to test the chisel. The Court affirmed an order sustaining an exception to the libel and said (p. 133):

> "The general rule that it is the duty of the master to supply the servant with safe tools and appliances is subject to a well-established exception in case of common and simple tools and appliances. Upon the theory and for the reason that the servant has as good opportunity for ascertaining defects in simple tools, such as a chisel, as the master has, the law relieves the master of the duty which it imposes upon him, where he furnishes complicated tools or machinery for the use of his servant. We are of opinion, therefore, that the decree of the court below was correct."

(c)

We may add that there is a further factor exculpating the defendant at bar besides the simple tool doctrine—to-wit, the circumstance that several other admittedly adequate wrenches were available (see *supra*, pp. 6-7). The *causa causans* of the accident at bar was the plaintiff's choice of a worn wrench, and his subjection of it to a greater strain than was consistent with safety and prudence, given its worn character (R. 25-26). This principle was exemplified in *Field* v. *Waterman S.S. Corp.*, 104 F. (2d) 849 (5th Circ., 1939), where plaintiff chose a defective stage from several that were available; and in *Plamals* v. *Pinar*

Del Rio, 277 U. S. 151, 155 (1928), where the mate "selected a bad rope when good ones were available". See also *Hedley* v. *Pinkney & Sons Steamship Co.*, [1894] App. Cas. 222, 228, holding a vessel not rendered unseaworthy where it had aboard all the equipment necessary for safety but it was not availed of by the crew.*

See also *Ireland* v. *E. J. Pinney, Inc.*, 91 N. H. , 18 Atl. (2d) 750 (1941).

(d)

The petitioner is in error in asserting in his brief (pp. 17-18) that the application of the simple tool doctrine to the facts at bar involves necessarily imputing to the seaman an assumption of risk, contrary to the rule announced by this Court in *Socony-Vacuum Oil Company* v. *Smith*, 305 U. S. 424 (1939), discussed *post*, p. 21.

It will be seen that there is not involved in the simple tool doctrine anything akin to the assumption of risk doctrine. Hence when the Jones Act abolished the defense of assumption of risk, the simple tool doctrine was not impaired or affected in any way. Moreover, the assumption of risk doctrine was not invoked in this case and is not necessary to the decision.

The petitioner's argument to the contrary betrays a misconception of the considerations behind the formulation of the simple tool doctrine. These considerations were not that the employé assumed the risk consequent upon using a defective tool, but that it was primarily the employé's duty to remedy the defect (which he had greater opportunities to discover than the employer), or avoid the use of the tool in

* Here to permit seamen to traverse the deck in safety, stanchions and rails should have been erected by the crew across the openings in the bulwarks from an available supply but were not. The shipowner was held not liable for the death of a seaman swept overboard as a result of the failure to set the stanchions and rails in place.

question. This was made perfectly clear in *Newbern* v. *Great Atlantic & Pacific Tea Co.*, 68 F. (2d) 523 (4th Circ., 1934), where the Court, affirming a judgment for defendant in an action by an employé injured when a wheel came off of a floor scale, said (p. 525):

> "• • • this duty [on an employer's part to see that appliances are in safe condition] does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects. 39 C. J. [tit. Master and Servant, § 462] 342; 18 R. C. L. [tit. Master and Servant, § 74] 563 †. • • •. This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possibility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects of such tools, that no inspection is necessary to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery. With respect to simple tools, ordinarily the master is not relieved of responsibility because the servant assumes the risk, but the servant assumes the risk because the master is relieved of responsibility, • • •."

In *Hedicke* v. *Highland Springs Co.*, 185 Minn. 79, 239 N. W. 896 (1931), plaintiff, while handling carboys of water in wooden cradles, ran a splinter in his hand, because one of the slats was loose and broken. In holding there was

† See for a modern (1941) restatement of this text, 35 Am. Jur., tit. Master & Servant, § 143, page 573.

no proof of negligence and no right in the plaintiff to recover, the Court held that the simple tool doctrine was not premised on assumption of risk but rested (p. 83)

> "upon the theory that as to such a tool the master owes the servant no duty to inspect for the purpose of discovering whether the ordinary use had produced some defect therein which would endanger the user. If there is no duty to discover and remedy such defects, of course there can be no negligence inferred from the mere proof that defects developed in the use of a simple appliance."

It would seem that the real reason why the simple tool doctrine does not involve assumption of risk is that the phrase "assumption of risk" refers to extraordinary risks created or enhanced by the master's negligence, the responsibility for which is primarily the master's. The result in cases where the assumption of risk defense applies is that recovery is barred in spite of the master's negligence where it is shown that the servant knew of the master's negligence and the consequent enhancement of the risk, but nevertheless continued in the employment. But where the primary duty to detect defects in simple tools is the employé's and not the master's, the retention on the premises of a tool with an undetected defect is not negligence on the master's part. The duty to guard against the possibility of injury is the employé's, *ab initio*, originally and not derivatively, by virtue of the imposition on his own shoulders of the duty of detection.

The assumption of risk doctrine must presuppose a finding of negligence on the part of the master. Hence it is not applicable or necessary here, since the evidence does not establish negligence on the part of the respondent but, on the contrary, a freedom from negligence, as both Courts below found (R. 39-41, 45). In other words, the Circuit

Court of Appeals in the case at bar was eminently sound when it said (R. 45):

> "The master's freedom from liability is not because the employee has been negligent or has knowingly assumed the risk—both contributory negligence and assumption of risk being excluded as defenses under the Jones Act—but because the master has been guilty of no negligence with respect to the tool used by the employee."

The cited cases, especially the *Newbern*, *Pittsburgh Steamship*, *Allen Gravel*, and *Hedicke* cases, *supra*, show the utter lack of soundness in the petitioner's argument (Brief, p. 11) that the simple tool doctrine applies only to tools defective in manufacture or construction, and not to tools which have become defective through wear.

4. The decision below does not conflict in any way with the decision in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424.

In *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (1939), the plaintiff-respondent was injured by a step in the engine room, which he knew to be defective. Its condition was due to the negligence of the shipowner, who had two to three weeks* notice of it and did nothing; and, under the applicable statute, the duty to guard against injury from defects in the structure of the ship clearly rested with the owner. As the seaman, however, knew of the defect in the step, the comparative negligence rule was applied. Furthermore, in the *Socony-Vacuum* case the plaintiff had no knowledge of the existence of a feasible alternative method of fulfilling his mission without using the defective step.

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* In the case at bar the City had only two days notice of the fact that the wrench had become worn (R. 24), and had apparently ordered a new one (R. 14).

In the case at bar, the plaintiff knew of the availability of other wrenches suitable for the purpose.

The *Socony-Vacuum* case was cited in *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 F. (2d) 745 (2nd Circ., 1941), decided two weeks after the case at bar, by the same panel of Judges. But there the plaintiff's fall was attributable not to his use of a defective ladder, for it was adequate if held, but to his fellow-servant's conduct. The latter had been holding the ladder for the plaintiff but suddenly let go when plaintiff's ascent was half completed.

In the instant case, we have shown that under the simple tool doctrine no negligence is chargeable to the shipowner. No occasion arises for applying the comparative negligence rule when only one party is chargeable with negligence.

POINT III.

Since the plaintiff had complete familiarity with the type of wrench furnished for the work he was doing, and testified himself that it was the kind customarily and generally employed for the purpose at hand, it was not error to exclude opinion testimony as to the superior merits of another type of wrench.

We regard this point as frivolous. The plaintiff himself was asked (R. 16):

> "Q. What kind [of wrenches] are generally used for removing studs on strainers and cylinder heads?"

The Court interpolated "Do you know?" and he—a man with 20 years' experience (R. 9)—answered (*ibid.*):

> "Yes; a straight open end wrench."

The plaintiff himself having resolved, clearly and unequivocally, the factual issue raised by his own counsel, it seems absurd to argue that he should be later allowed to

resuscitate a dead issue and *create* doubt by calling a witness to give contradictory opinion testimony (R. 30). We may say, in general, of opinion evidence what this Court said of extrinsic aids to statutory construction (in *Wisconsin Railroad Comm.* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 589 [1923]), that it is "only admissible to solve doubt and not to create it".

Moreover the rejected testimony was tendered for the purpose of proving a counsel of perfection—a standard of care not sanctioned by the cases. As was said in *The Tawmie*, 80 F. (2d) 792, 793 (5th Circ., 1936):

> "Though shipowners are held to a strict degree of diligence, seaworthiness does not require absolute perfection, nor are owners held to the duty of furnishing appliances having the highest known degree of safety. It is sufficient if the equipment be that which is reasonably fit and safe for its purpose, and reasonably adequate to the place and occasion where used by direction of the owners."

See also *The Cricket*, 71 F. (2d) 61, 63 (9th Circ., 1934).

To the same effect is *Phillips* v. *Chicago, Burlington & Quincy R. Co.*, 119 Neb. 182, 227 N. W. 931 (1929), where the Court reversed a judgment premised on the proposition that it was negligence to furnish a track-repairer a pick instead of tie-tongs, and said (p. 184):

> "We must determine whether the furnishing of one tool for the work rather than another was such negligence as would sustain a verdict for the plaintiff. The employer is not bound to supply the best, the newest, or the safest tools to insure the safety of his employee. It is his duty to use all reasonable care and prudence for the safety of his employees, by providing them with machinery and tools reasonably safe and suitable for the use to which they are to be put."

See also *Marsh* v. *Chickering*, 101 N. Y. 396, 400 (1886).

Furthermore, it should not be forgotten that plaintiff based his case solely on the condition of the particular wrench he had in his hand, and not on the defendant's failure to supply a wrench of another and different type (R. 13, 15; *ante*, pp. 4-5). And in view of his twenty years experience on municipal ferryboats, doing this kind of work, it is of real significance that it never appeared to him necessary to have at his disposal another type of wrench. The record shows he never asked for any other (R. 14, 15).

Conclusion.

The judgment below should be affirmed.

February 11, 1942.

WILLIAM C. CHANLER,
Corporation Counsel
of the City of New York,
Counsel for Respondent.

PAXTON BLAIR,
ALFRED T. WHITE,
LEON SHAW,
of Counsel.

LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300

SUPREME COURT OF THE UNITED STATES.

No. 589.—October Term, 1941.

William Jacob, Petitioner, vs. The City of New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 30, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act[1] for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint,[2] thereby refusing to submit the case to a jury which had been duly empanelled to try it. In holding that petitioner had failed to prove facts sufficient to warrant submitting the issue of respondent's negligence to the jury, the trial court relied on the so-called simple tool doctrine. The

[1] 41 Stat. 988, 1007, 46 U. S. C. § 688.

[2] The complaint set forth two causes of action—the first for personal injuries and the second for maintenance and cure. Respondent moved to dismiss only the first cause of action. At the same time, in settlement of the second cause of action, respondent offered to consent to judgment for loss of wages from the time of the accident until petitioner returned to work. This offer was refused by petitioner's counsel and the second cause was thereupon dismissed. The Circuit Court of Appeals, sua sponte, directed that judgment be entered on the second cause of action for petitioner in the amount admitted to be due from respondent. That judgment is not in issue here. Only the first cause of action, that for personal injuries, survives for our consideration.

Circuit Court of Appeals affirmed. 119 F. 2d 800. The novel questions thus presented in the administration of the Jones Act prompted us to grant certiorari. 314 U. S. —.

Petitioner's testimony[3] is the complete answer to the question whether the case should have been taken from the jury. The gist of that testimony is as follows: For three weeks prior to the accident petitioner, an employee with twenty years' experience, had been serving as water-tender in charge of the fire-room on the "Dongan Hills", a ferry-boat operated by respondent between Staten and Manhattan Islands in New York harbor. One of his duties was to change oil strainers. This was done about three times a week and required the removal and replacement of a manifold head, housing the strainers, which was held in place by six studs and nuts. When the manifold was replaced, the nuts had to be very tight. The best tool to remove and to tighten the nuts was a straight end wrench fitting a 1¼" nut. Petitioner used an S-shaped end wrench of the proper size which was "well worn", "had seen a lot of service", was "a loose fit", and "had a lot of play on it". There was about one-sixteenth of an inch "play in the jaws; it was worn." The wrench was about eighteen inches long and the "play" at the end was "about an inch". Petitioner asked the chief engineer for a new wrench three times, the first request being when petitioner first had occasion to use the worn wrench to change an oil strainer, and the last two or three days before the accident. In answer to this last request the chief engineer "said for me [petitioner] to look in the tool closet and see if there was one in there; and I went up there and couldn't find any and I believe he said he sent an order out for one." The regular way of requisitioning needed tools was by a report to the chief engineer. All petitioner was supposed to do was order; he did not know what respondent kept in its storeroom. The "Dongan Hills" docked at Manhattan Island on the average of six or seven times each day. On the day of the accident petitioner did not renew his request, but he did look in the chief engineer's tool set. He found no end wrench of the proper size, did not know if a Stillson wrench was there, but believed that a monkey wrench was. A monkey wrench could

[3] Petitioner was the sole witness in his own behalf. The trial court did not allow an opinion witness, called for the purpose of establishing the best type of wrench for the work petitioner was doing at the time of the accident, to testify.

"probably" be used on any nut. At the time of the accident petitioner was using the worn, S-shaped, end wrench to tighten the nuts after changing the oil strainer. There was about five-eighths of an inch of thread on the studs, and petitioner had changed the wrench on one nut four times. As he started the fifth tightening, the wrench slipped, causing him to fall from the eighteen inch square platform on which he was standing to the catwalk eighteen inches below. In the course of the fall petitioner sustained an injury to his right side which struck an angle iron alongside the catwalk.

The Jones Act, in addition to giving injured seamen the right to trial by jury in actions arising under the Act, also incorporates "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees". Among such statutes is 45 U. S. C. § 51 which provides in part that a carrier is liable for "injury or death . . . by reason of any defect or insufficiency, due to its [the carrier's] negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment".

Although proof of negligence is an essential to recovery under the Jones Act, *Kunschman* v. *United States*, 54 F. 2d 987; cf. *Beadle* v. *Spencer*, 298 U. S. 124, 128, contributory negligence and assumption of risk are not available defenses. The admiralty doctrine of comparative negligence applies. *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424. The salient points of petitioner's testimony, summarized above, made a sufficient showing to allow the jury to consider the issue of respondent's negligence. The wrench petitioner was using had become defective for the purpose for which it was designed. After discovering that defect petitioner made three requests to the proper person, the chief engineer, for a new wrench. The first of those requests was about three weeks prior to the accident, the last but two or three days before it occurred. At that time the chief engineer said he sent out an order for one, but it was not forthcoming in the two or three days intervening before the accident despite the fact that the "Dongan Hills" docked at Manhattan Island six or seven times a day. While the best tool for doing the work was a straight end wrench of the proper size, petitioner had access to a monkey wrench which "probably" could be used on any nut. We think these facts entitled petitioner to have the jury

consider whether his injury was caused by any "defect or insufficiency, due to its [respondent's] negligence, in its appliances". That is to say, it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work, whether respondent's failure, although it had at least two days' and possibly three weeks' notice of the defect, to supply petitioner with a new wrench amounted to negligence on its part, and whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use. Cf. *Socony-Vacuum Co.* v. *Smith, supra.* Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury.

The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application,[4] suggest that it should not apply to cases arising under legislation, such as the Jones Act, designed to enlarge in some measure the rights and remedies of injured employees.[5] But even assuming its applicability, the doctrine does not justify withdrawing this case from the jury. For the only possible basis for the doctrine which is compatible with the provisions and policy of the Jones Act is that the master is not negligent in the case of defective simple tools because the possibility of injury from such tools is so slight as to impose no duty on him to see that they are free from defects in the first instance or to inspect them thereafter.[6] *Newbern* v. *Great Atlantic & Pacific Tea Co.*, 68 F. 2d 523; cf. *Hedicke* v. *Highland Springs Co.*, 185 Minn. 79, 239 N. W. 896—or to put it another way, the master is relieved of the duty to inspect simple tools

[4] See 3 Labatt, Master and Servant (2d ed.), pp. 2476-2484.

[5] Compare McCarthy v. Palmer, 113 F. 2d 721, with Spain v. Powell, 90 F. 2d 580.

[6] If the doctrine is but a phase of assumption of risk or contributory negligence, as has been suggested (see Labatt, *op. cit.*, pp. 2479, 2480, 2484), it is manifestly not applicable to actions under the Jones Act for those common-law affirmative defenses are not available in such actions. Socony-Vacuum Co. v. Smith, 305 U. S. 424.

for defects because the servant's opportunity for ascertaining such defects is equal to or greater than the master's. *O'Hara* v. *Brown Hoisting Mach. Co.*, 171 F. 394; *Miller* v. *Erie R. R. Co.*, 21 App. Div. (N. Y.) 45; 2 Agency A. L. I. § 503(d). Petitioner inspected the wrench, found it defective and then asked three times for a new one. This satisfied the burden of inspection placed on his shoulders by the doctrine, and it was then for the jury to say whether respondent's failure to comply with those repeated requests was negligence on its part. To deny petitioner the right to have the jury pass on that issue because of the simple tool doctrine is to say that doctrine relieves the master of any duty to furnish reasonably safe and suitable simple tools in spite of the fact that he knows they are defective, and requires the servant not only to inspect simple tools for defects, but also to supply his own simple tools when he finds those of the master defective. This is so obvious a perversion of the Jones Act as to require no comment.[7]

Since there must be a new trial we deem it appropriate to state that in our opinion no reversible error was committed when the trial court refused to allow opinion testimony as to the best type of tool for the work.[8] Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable. Cf. *The Tawmie*, 80 F. 2d 792; *The Cricket*, 71 F. 2d 61.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

So ordered.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in the result.

The CHIEF JUSTICE, Mr. Justice ROBERTS, and Mr. Justice REED are of opinion that the judgment below should be affirmed.

And, if the scope of the doctrine is that a master is under no duty to furnish reasonably safe and suitable simple tools (see Allen Gravel Co. v. Yarbrough, 133 Miss. 652, 98 So. 117; Middleton v. National Box Co., 38 F. 2d 89), the doctrine is hardly compatible with the scheme of the Jones Act fixing liability on a master for injuries caused by defects and insufficiencies in his appliances due to his negligence.

[7] See note 6, *ante*.

[8] See note 3, *ante*.